Catholic Judges and Cooperation in Sin

Edward A. Hartnett
ARTICLE

CATHOLIC JUDGES AND
COOPERATION IN SIN

EDWARD A. HARTNETT*

I. Catholic Judges and American Law ......................... 222
II. Cooperation and its Context .............................. 230
   A. Formal versus Material Cooperation .................. 230
   B. Cooperation and Related Doctrines ................. 233
      i. Charity, Fraternal Correction, and Scandal .... 237
      ii. Double Effect ................................ 238
III. Distinguishing Judicial Decisions as Constituting Formal or Material Cooperation ..................... 241
   A. Capital Punishment ................................ 242
   B. Marriage and Divorce ................................ 246
   C. Abortion ............................................. 248
IV. Determining the Permissibility of Material Cooperation by Judges ........................................... 251
   A. Material Cooperation in Other Walks of Life ...... 252
   B. Material Cooperation by Judges .................... 254
V. Resignation, Recusal, or One-Way Recusal ................ 257
   A. Recusal or Resignation ................................ 258
   B. Other Suggested Alternatives ....................... 264
      i. Decline to Rule at All in Abortion Bypass Cases 264
      ii. One-Way Recusal ................................ 265
   C. The Interaction of Cooperation and Recusal ....... 267
VI. Conclusion ............................................... 267

* Richard J. Hughes Professor for Constitutional and Public Law and Service, Seton Hall University School of Law. I thank Fr. Robert Araujo, S.J., Angela Carmella, John Coverdale, Richard Garnett, Fr. Nicholas Gengaro, John Jacobi, Fr. Gregory Kalscheur, S.J., Fr. Frank McNulty, Frank Pasquale, Charles Sullivan, William Toth, the participants at faculty workshops at Seton Hall and St. Thomas, as well as the other participants at the conference, for helpful and challenging comments. I also thank the late James N. Loughran, S.J., for allowing me the use of an office and other facilities at St. Peter's College while trying to broaden and deepen my knowledge of Catholic moral theology. AMDG.

221
I. CATHOLIC JUDGES AND AMERICAN LAW

It is an honor to be discussing Catholic judges and cooperation in sin at a university named for St. Thomas Aquinas, particularly alongside a larger-than-life statue of St. Thomas More. More, the patron saint of statesman and of lawyers, was the first layman to be Lord Chancellor of England.¹ He was also a martyr who, at his execution for treason, declared himself the King’s good servant, but God’s first.²

For the first time in its history, the Supreme Court of the United States has a majority of Catholic Justices.³ The President making the relevant appointments did very well among Catholic voters in the 2004 presidential election despite running against a Catholic opponent. During the course of that campaign, some Catholic bishops promised to withhold communion from Catholic candidates whose positions were inconsistent with Catholic teaching. Some within the Catholic Church (the “Church”) extend their criticism to judges whose decisions are inconsistent with Catholic teaching and castigate Catholic schools for honoring them, raising the question whether such judges should also be denied communion. Some suggest that Catholic judges might be obliged to resign; others suggest that recusal in particular cases of conflict would be sufficient.

In this environment, some worry that Catholic judges will not be faithful to the law, while others worry that Catholic judges will not be faithful to the Church’s teaching. Catholic judges, it seems to me, should be concerned with both their faithfulness to the law and to their informed consciences.

The requisite quorum of the Supreme Court is six.⁴ If all of the Catholics on the Supreme Court were to resign, the Supreme Court would be completely disabled from functioning; if they were all to recuse themselves in a case, it would be disabled from deciding that case. Indeed, the same result would obtain if all but one of the Catholics were to resign or recuse. Moreover, there are thousands of Catholic judges in state and federal courts around the country. In these circumstances, it is crucial to analyze carefully both the moral obligations of Catholic judges and their legal obligations regarding recusal.

There is some vague sense that raising these questions is somehow inappropriate or even anti-Catholic. While the nomination of John Roberts to the Supreme Court was before the Senate, Jonathan Turley reported that

³. Neela Banerjee, Archbishop’s Call for Court Blessing Steers Clear of Issues, N.Y. TIMES, Oct. 12, 2006, at A12 (noting that the Supreme Court “has a Catholic majority for the first time” and the “five Catholics on the court are Chief Justice John G. Roberts, Jr., and Justices Anthony M. Kennedy, Clarence Thomas, Antonin Scalia, and Samuel A. Alito, Jr.”).
Senator Richard Durbin had asked Judge Roberts what he would do if the law required a ruling that the Catholic Church considered a sin, and that Roberts "answered after a long pause that he would probably have to recuse himself." Some criticized Senator Durbin for asking the question, claiming he was applying a religious test for office, and his spokesman quickly denied the accuracy of the report.

Senator Durbin did not ask such a question at the confirmation hearings. Instead, Senator Specter engaged Judge Roberts in the following colloquy:

Chairman Specter: There had been a question raised about your personal views, and let me digress from Roe for just a moment because I think this touches on an issue which ought to be settled. When you talk about your personal views, and as they may relate to your own faith, would you say that your views are the same as those expressed by John Kennedy when he was a candidate and he spoke to the Greater Houston Ministerial Association in September of 1960, "I do not speak for my church on public matters and the church does not speak for me"?

Judge Roberts: I agree with that, Senator, yes.

Chairman Specter: And did you have that in mind when you said, "There is nothing in my personal views that would prevent me from fully and faithfully applying the precedent as well as Casey"?

Judge Roberts: Well, I think people's personal views on this issue derive from a number of sources, and there's nothing in my personal views based on faith or other sources that would prevent me from applying the precedents of the Court faithfully under principles of stare decisis.

Neither Senator Specter nor any other senator pressed Judge Roberts on what he would do if something in his faith did prevent him from applying the law faithfully. This paper argues that the answer attributed to Judge Roberts by Turley—whether or not he actually said it—was the correct one. Indeed, in an often-overlooked paragraph immediately following the one quoted by Senator Specter from Kennedy's famous Houston Ministerial Association speech, John Kennedy stated:

But if the time should ever come—and I do not concede any conflict to be remotely possible—when my office would require me to either violate my conscience or violate the national interest,

---

6. Charles Hurt, Durbin Offered Proof of Column: Writer Defends Roberts Piece, WASH. TIMES, Aug. 15, 2005, at A1 (reporting these developments as well as Professor Turley's defense of his original account).
then I would resign the office; and I hope that any conscientious public servant would do likewise. 8

Although the duties of the office and the possibility of individual-case recusal are different for Presidents and judges, the fundamental point is the same: a public official, including a Catholic public official, can generally exercise official duties faithfully, but if a choice must be made between official duties and conscience, then the official duties must be given up.

The fundamental conflict between the demands of morality and the demands of civil law can confront any judge. Indeed such a conflict can only be categorically avoided if a judge believes that the civil law and the moral law are inevitably coextensive. A judge could reach such a conclusion either by viewing the civil law as the ultimate determinant of morality or by viewing adjudication as a license to interpret the law in whatever way necessary to make it accord with the judge’s moral views. Few if any people (and certainly no Christian, considering the condemnation of Jesus) would accept the former, and few, if any, judges would accept (or at the very least publicly endorse) the latter. The potential for conflict must be admitted by any judge who believes both that ascertaining the law is meaningfully different from ascertaining one’s own moral views and that the demands of the civil law are not the highest authority. If, as John Courtney Murray liked to put it, “two there are,” a judge cannot simply blink away this possibility. 9

8. Senator John F. Kennedy, Address to the Greater Houston Ministerial Association (Sept. 12, 1960), available at http://www.americanrhetoric.com/speeches/jfkhoustonministers.html; see also Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States Before S. Comm. on the Judiciary, 99th Cong. 44 (1986), available at http://www.gpoaccess.gov/congress/senate/judiciary/sh99-1064/browse.html (Justice Scalia stated that a judge should recuse himself “where he himself is personally convinced that he cannot decide the question impartially because he feels so strongly about the morality of the issue.”).

9. See JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 206 (1960) (noting that “the Gelasian thesis, ‘Two there are,’ . . . had been the dynamic of the Christian revolution”); id. at 207 (noting that Rousseau complained that by separating the theological system from the political system [Jesus] brought it about that the State ceased to be one, and caused internal divisions which have never ceased to agitate Christian peoples. From this twofold power there has resulted a perpetual conflict of jurisdiction which has rendered all good politics impossible in Christian states. No one has ever been able to know which one to obey, priest or political ruler.); id. (noting that Hobbes commented that “[t]emporal and spiritual government are but words brought into the world to make men see double and mistake their sovereign”). The reference to the Gelasian thesis is to a letter by Pope St. Gelasius I to Emperor Anastasius, which begins “Duo sunt.” Catholic Encyclopedia: Pope St. Gelasius I, http://www.newadvent.org/cathen/06406a.htm (last visited Apr. 7, 2007) (“there are two powers by which chiefly this world is ruled . . . ”).

In commenting on this paper, Professor Amy Barrett noted that some judges “assume that service to the civil law, at least in a legitimate governmental regime, is always a morally neutral act.” Amy Barrett, Address at the University of St. Thomas Law Journal Symposium: Catholicism and the Court (Nov. 10, 2006) (on file with the University of St. Thomas Law Journal). While she may well be right, I share her hope that judges and those who evaluate them will not rest content with this assumption. See JOHN D. DAVIS, THE MORAL OBLIGATIONS OF CATHOLIC CIVIL JUDGES 112–13 (1953) (quoting Pope Pius XII that “a judge cannot simply throw responsibility for his decision from his shoulders, causing it to fall on the law and its authors”); id. at 113 (noting that a
Although these conflicts can arise for any judge, the focus of this paper is on Catholic moral theology. There are three reasons for this focus. First, and most basically, I am a Catholic law professor at a Catholic school, thus I am drawing on my own faith tradition. Second, this is an area of current controversy, with some Catholics concerned about the faithfulness of Catholic judges to Catholicism, and some non-Catholics concerned about the faithfulness of Catholic judges to the law. Third, Catholic moral theology has longstanding tools with which to address the problem, tools that are insufficiently appreciated by critics, and I suspect by judges as well.

This paper explores the basic tool that Catholic moral theology offers to handle situations where a judge's moral views and legal interpretation conflict—the doctrine of cooperation—and applies that tool in several particular circumstances. It is the work of a law professor exploring moral theology and attempting to bring the fruits of that exploration home to the practice of judging. My hopes are ambitious, more ambitious perhaps than they should be for a non-theologian. I hope this paper will be useful, first and foremost, to Catholic judges contemplating what actions to take. I also hope it will be useful to those who seek to evaluate the conduct of Catholic judges. Evaluators both inside and outside the Catholic Church would benefit from greater attention to the nuanced nature of Catholic moral teaching and the varied kinds of cases confronting judges. Finally, I hope this article might be of some use even to judges who are not Catholic (and those who evaluate them). Particularly since Catholic teaching is rooted in reason (while bolstered by faith), they might find some insight in the approach of one faith tradition to the conflicts that they confront between law and moral judgment.  

Perhaps these questions could be safely ignored if there were little conflict between Catholic teaching and American law, but there are a host of areas where Catholic teaching and American law conflict. The following does not remotely attempt to be an exhaustive list of examples: The Church teaches that artificial contraception is wrong; American law protects it. The Church teaches that direct abortion is wrong; American law protects it.  

13. CATECHISM OF THE CATHOLIC CHURCH, supra note 11, Nos. 2270–75.
it. The Church teaches that fornication and homosexual conduct are wrong; American law protects both. The Church teaches that the death penalty is almost always wrong; more than one thousand people have been executed under American law since 1976. The Church teaches that marriage is permanent; American law generally treats marriage as basically an at-will contract. The Church teaches the universal destination of all property and that private property is held under a social mortgage; American law does not. The Church teaches a preferential option for the poor; American law does not. The Church teaches an obligation to welcome the alien; American law does not. The Church teaches conscientious objection to particular unjust wars; American law refuses to recognize selective conscientious objection.

It is important to acknowledge that the Church does not teach that the state must make laws against all sins.

The tradition stretching back to Aquinas never held that the civil law could or should reproduce morality as such, that it could or should enforce all moral obligations. Whether those entrusted with legislative authority for the common good should pass this or that law depends (even if the action prohibited by the law is truly immoral) upon a host of contingent prudential considerations.

15. Catechism of the Catholic Church, supra note 11, Nos. 2353 (fornication), 2357–59 (homosexual conduct).
16. See Lawrence v. Tex., 539 U.S. 558 (2003); Eisenstadt v. Baird, 405 U.S. 438 (1972). Prior to Lawrence, it was possible to view Eisenstadt as leaving states free to prohibit fornication, but that seems quite implausible after Lawrence.
17. Catechism of the Catholic Church, supra note 11, No. 2267.
19. Catechism of the Catholic Church, supra note 11, Nos. 2382–86.
20. Ann Laquer Estin, Economics and the Problem of Divorce, 2 U. Chi. L. Sch. Roundtable 517, 528 (1995) (noting that current law “effectively converted the traditional marriage contract into something more akin to a traditional at-will employment contract or to a voluntary contractual association terminable at will by its members”).
23. Catechism of the Catholic Church, supra note 11, No. 2241.
26. Robert P. George & Gerard V. Bradley, John Paul II (1920–2005), in The Teachings of Modern Christianity on Law, Politics, & Human Nature 220, 243 (John Witte, Jr. & Frank S. Alexander eds., 2006) [hereinafter The Teachings of Modern Christianity]; see also Ab-
Among those prudential considerations are whether such a law would be obeyed, whether it would be enforceable, and whether it would produce harmful effects. Prudence may call for leaving the protection of some moral obligations to subsidiary groups, rather than to the state. In some circumstances, then, the conflict is more apparent than real, in that Church teaching supports both the conclusion that $x$ is sinful, and the conclusion that the law should not prohibit $x$. For this reason, a judge who, in accordance with the law, simply withholds that hand of the state from enforcing a particular moral norm may be acting in perfect harmony with the teaching of the Catholic Church.

To take an easy example, I am aware of no one today who thinks that prudence calls for laws against the use of artificial contraceptives. Thus a judge faces no genuine conflict between American law protecting the use of artificial contraceptives and the Church’s teaching that they are sinful.

Moreover, since the landmark pronouncement forty years ago in Dignitatis Humanae, the Catholic Church has proclaimed religious liberty for all. Accordingly, a judge faces no genuine conflict in adhering to the
legal requirements of the First Amendment and, for example, refusing to punish someone who refuses to love God.\textsuperscript{32}

Yet this limitation, while important, only goes so far. For example, it does not help in those situations, such as abortion, where the Church’s teaching requires the state to act and provide legal protection.\textsuperscript{33} Nor does it help in situations, such as the death penalty, where the Church’s teaching is specifically directed to limiting the action of the state.\textsuperscript{34} More generally, it offers no help except in those situations where the state is permissibly declining to intervene in the behavior of non-governmental individuals and entities.\textsuperscript{35}

This paper examines and applies the doctrine of cooperation in several particular circumstances. Significantly, this doctrine helps us to see clearly that all judicial decisions involving the areas of conflict are not the same.\textsuperscript{36} To use Dean John Garvey’s imagery, in some cases the conflict is head-on, while in others the conflict is at a more or less glancing angle.\textsuperscript{37} In this latter situation, it may well be possible to accommodate both of the conflicting demands.

Finally, it is sometimes thought that Catholic teaching is a set of rules imposed by a lawmaking authority on those subject to its jurisdiction. To this way of thinking, the Catholic Church adopts a rule and therefore Catholics must follow that rule: the Church’s rule makes it wrong for Catholics to engage in certain behavior. But while there are some rules like that (such as the Lenten discipline of fast and abstinence), for the vast majority of Catholic teaching this view is pretty much backward.

The Church’s teaching is just that—teaching. That is, the Church attempts to ascertain the moral truth and teach that truth. In other words, an act is not wrong because the Church says it is wrong; instead, the Church.

\textsuperscript{32} Cf. CATECHISM OF THE CATHOLIC CHURCH, supra note 1, No. 2094 (stating that to “refuse to acknowledge divine charity and to return him love for love” is a “sin against God’s love”).

\textsuperscript{33} Id. at No. 2273.

\textsuperscript{34} Id. at No. 2267.

\textsuperscript{35} Moreover, any attempt to define with precision the situations in this category are likely to run into the same difficulties that best the state action problem in American Constitutional law; in any case, some state action can be found, if only in the willingness to enforce the background rules of property. See, e.g., Paul Brest, State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks, 130 U. Pa. L. Rev. 1296, 1321 (1982). Thus, a refusal to redistribute resources from the rich to the poor might, at first blush, be viewed simply as the state declining to intervene, but if one conceives of the question as involving the legitimacy of the underlying property right of the rich in the first place, the state is not simply declining to intervene but acting to protect that property right.

\textsuperscript{36} I make no attempt to examine all areas where Catholic teaching and American law conflict, or even all areas where the conflict is more apparent than real, because prudence calls for the law to stay its hand; nor do I focus on the question of whether and to what extent a judge’s religious views properly inform his or her legal views.

\textsuperscript{37} John Garvey, Dean, Boston College Law School, Remarks at a Meeting of the Law Professors’ Christian Fellowship: Panel on The Faithful Judge: How Can a Judge Be Faithful to Both Christ and Law? (Jan. 7, 2006).
says that an act is wrong because it is wrong. Unlike Lenten regulations that bind only Catholics, when the Church teaches that an act is wrong, it does so because it believes that it is wrong—not just for Catholics, but for all persons.38

The Church seeks to inform people’s consciences, insists that consciences be well-informed, and recognizes that consciences may be mistaken—but has nevertheless long taught that a person “must always obey the certain judgment of his conscience.”39

This emphasis on conscience sometimes comes as a surprise to non-Catholics, and even some Catholics. It certainly does not mean that the Catholic Church accepts relativism. To the contrary, it insists that there is such thing as objective moral truth, that it is the task of reason to find it, and that as Aquinas put it, “the will is bound to follow reason, right or wrong.”40 One of the staunchest defenders of the Church’s teaching was once criticized for writing a book that attempted to answer moral questions people had posed to him, with the critic contending that the author should tell them to follow their own consciences.41 He replied, “Of course I tell people that, but some people think they need help in forming their consciences.”42

This emphasis on conscience means that some (perhaps even most or all) Catholic judges will have consciences at variance with some aspect of the Church’s teaching. To the extent that a judge’s conscience corresponds with the law, the conflict with which this paper is concerned does not arise. On the other hand, to whatever extent the judge’s conscience does not cor-

38. Professor Tamanaha misses this point when he suggests that Catholic moral doctrine permits a Catholic to ask someone else to do for him what he is forbidden to do himself. Brian Z. Tamanaha, Good Casuistry and Bad Casuistry: Resolving the Dilemmas Faced by Catholic Judges, 4 U. St. Thomas L.J. 269 (2007) (making comparison with use of goyim and separate discussion of judges); cf. ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING 58 (1988) (noting that the vast bulk of the Halakhah constitutes law that is only applicable to the Jewish community rather than morality “making equal claims on all human beings”). I also believe that Jewish teaching regarding the use of goyim to do work forbidden on the Sabbath is far more complex than Tamanaha’s discussion reveals, but I will not attempt to pursue that here.

39. CATECHISM OF THE CATHOLIC CHURCH, supra note 11, No. 1790 (“A human being must always obey the certain judgment of his conscience.”); HERIBERT JONE, MORAL THEOLOGY § 87 (Rev. Urban Adelman trans., 1947) (1945) (“A certain conscience must always be obeyed.”); FRANK J. McNULTY & EDWARD WAKIN, SHOULD YOUR EVER FEEL GUILTY? 37 (1978) (“Laws perform various functions, but they are not the final word. The individual conscience is.”).


42. Id.; see also id. at xviii (noting that when pointing out that someone seems to have done or is about to do something wrong, “one must not judge and condemn the person: God alone knows whether and how clearly he or she knows that the act is wrong, and whether and how freely he or she chooses to act contrary to that conscience”).
respond with the law (even if it also does not correspond to the Church’s teaching), the conflict does arise. 43

II. COOPERATION AND ITS CONTEXT

A. Formal versus Material Cooperation

Under the doctrine of cooperation, a person may never formally cooperate in the sin of another, but may, in some situations, materially cooperate in the sin of another. The doctrine is by no means limited to judges, but rather addresses the wide range of situations in which one person helps another to sin. And in an interdependent and sinful world, much of what we do helps others to sin in some way. As Germain Grisez has noted:

Some unreflective and/or unsophisticated people imagine problems involving cooperation can (and perhaps should) be avoided by altogether avoiding cooperation. That, however, is virtually impossible and sometimes inconsistent with doing one’s duty. Grocers materially cooperate with glutinous eating, letter carriers with the use of pornography, and so on; and in many cases such people need their jobs to support themselves and their families. And though taxpayers materially cooperate with nuclear deterrence and other evils, paying taxes is morally obligatory 44

Indeed, Father James F. Keenan, S.J., has suggested that the doctrine of cooperation “can serve as a paradigm for the modern Christian who seeks to

43. There is no good adjective (of which I am aware) for Catholics whose consciences are fully in accord with Church teaching. “Traditional” is one possibility, but many traditional Catholics adhere to older views concerning the death penalty. “Orthodox” is another possibility, but that runs the risk of confusion with the Eastern Church. (Use of the term “Catholic” rather than “Roman Catholic” runs a similar risk, but in the United States, the unmodified word “Catholic” is generally read as a reference to Roman Catholic.) John Garvey and Amy Coney Barrett struggled with a similar problem in choosing an adjective that means nothing more nor less than “faithful to the teaching of the church on the subject of capital punishment.” John H. Garvey & Amy V. Coney [Barrett], Catholic Judges in Capital Cases, 81 MARQ. L. REV. 303, 305 n.8 (1998). They settled for “orthodox” despite the risk of confusion with eastern churches and its use as a sociological term allied with religious conservatism. They also considered and rejected “observant” because it tends to signify participation in the sacraments and rituals of the church. Id. “Faithful” is sometimes used, but that suggests that all others are not faithful. A colleague suggested the term “iso-Catholic,” but I fear that this neologism may prove unhelpful and perhaps even offensive. This paper will simply use the term Catholic without any adjective, while acknowledging from the outset that, for a variety of reasons (good and bad), not all Catholics adhere to the teaching of the Catholic Church. Nor do I attempt in this paper to evaluate the correctness or propriety of those various reasons.

44. 3 Grisez, supra note 41, at 871. “Moreover, in God’s absolutely good act of sustaining the creatures he has chosen to create, he accepts as side effects all the wrongdoing and other evil in the universe . . . and Jesus teaches us to be like our heavenly Father, who sustains both sinners and upright people. . . . So, good people sometimes may and even should cooperate in others’ wrongdoing, and cases involving cooperation require careful analysis and judgment.” Id. at 871–72.
make the world a better place by neither compromising values nor detach­ing oneself from a world ridden with complexities.”

Pope John Paul II emphasized the importance of the doctrine of coop­era­tion in connection with unjust laws:

The passing of unjust laws often raises difficult problems of con­science for morally upright people with regard to the issue of co­operation, since they have a right to demand not to be forced to take part in morally evil actions. Sometimes the choices which have to be made are difficult; they may require the sacrifice of prestigious professional positions or the relinquishing of reason­able hopes of career advancement. In other cases, it can happen that carrying out certain actions, which are provided for by legis­lation that overall is unjust, but which in themselves are indiffer­ent, or even positive, can serve to protect human lives under threat. There may be reason to fear, however, that willingness to carry out such actions will not only cause scandal and weaken the necessary opposition to attacks on life, but will gradually lead to further capitulation to a mentality of permissiveness.

In order to shed light on this difficult question, it is necessary to recall the general principles concerning cooperation in evil ac­tions. Christians, like all people of good will, are called upon under grave obligation of conscience not to cooperate formally in practices which, even if permitted by civil legislation, are con­trary to God’s law. Indeed, from the moral standpoint, it is never licit to cooperate formally in evil. Such cooperation occurs when an action, either by its very nature or by the form it takes in a concrete situation, can be defined as a direct participation in an act against innocent human life or a sharing in the immoral inten­tion of the person committing it.

So, too, did Joseph Cardinal Ratzinger, prior to being named Pope Bene­dict XVI. As he stated in a letter to Theodore Cardinal McCarrick:

A Catholic would be guilty of formal cooperation in evil, and so unworthy to present himself for Holy Communion, if he were to delib­erately vote for a candidate precisely because of the candidate’s permissive stand on abortion and/or euthanasia. When a Catholic does not share a candidate’s permissive stand on abortion and/or euthanasia, but votes for that candidate for other rea­


sons, it is considered remote material cooperation, which can be permitted in the presence of proportionate reasons. 47

To a contemporary lawyer, the doctrine tends at first blush to appear backward. The word “formal” today frequently suggests a mere technicality, one that need not seriously detain anyone from the real underlying concern. It is common to criticize someone for focusing too much on form and not sufficiently on substance. The word “material,” by contrast, frequently suggests significant or meaningful, as in the requirement for summary judgment that there be no “genuine issue of material fact,” 48 or the requirement that evidence be material in order to be admissible. 49 In this usage, something can easily be “merely” formal, but can hardly be “merely” material. Thus formal cooperation in sin sounds eminently excusable, while material cooperation in sin sounds far more significant and serious.

In Catholic moral theology, however, the words “formal” and “material” retain a rather different, older meaning. Formal cooperation occurs when one shares the sinful intention of another, while material cooperation occurs when one helps another to sin without sharing in his or her sinful intention. 50 It is crucial to see, then, that the very same “outward behavior can be either formal or material cooperation, depending on what the cooper- ator intends.” 51 For example, a police officer who prevents pro-life workers from talking to women approaching abortion clinics because he wants women to have abortions is engaged in formal cooperation, while a police officer who does the same thing because she does not want to lose her job by refusing the assignment is engaged in material cooperation. 52

To appreciate the terminology, it may be helpful to bear in mind the distinction drawn by Thomas Aquinas and Aristotle between form and matter. In their metaphysics, something’s “form” is its essence—what makes it

48. FED. R. CIV. P. 56.
49. See Scott Brewer, Scientific Expert Testimony and Intellectual Due Process, 107 YALE L.J. 1535, 1544 n.19 (1998) (“The modern, statutorily enacted Federal Rules of Evidence have eliminated the handy reference to the distinction between materiality and relevance that was a centerpiece of the common law of evidence (though they fortunately have not eliminated the effective legal significance of the distinction itself). In the common law system, evidence was said to be ‘relevant’ if it tended to establish the point for which it was offered. It was ‘material’ if the point for which the evidence was offered actually bore on issues in the case.”).
50. See, e.g., 1 THOMAS SLATER, A MANUAL OF MORAL THEOLOGY FOR ENGLISH-SPEAKING COUNTRIES 203 (Michael Martin ed., 1908) (“Cooperation, then, may be formal or material. Formal cooperation is concurrence in the bad action of another and in the bad intention with which it is performed. Material cooperation is the concurrence in the external action of another but not in the evil intention with which it is done.”).
51. 3 GRÏŒZ, supra note 41, at 874.
52. Id.
it—while matter is simply the stuff that, in fact, takes on and loses different forms.53

The most enduring insight of Aristotle, taken up and developed by Thomas Aquinas, was that every constituent of the natural world is what it is by virtue of its essence. The essence of a thing is the intelligible form or unifying principle that constitutes the thing. This is what distinguishes a thing from every other sort of thing that is. It is one thing to be constituted as a horse, quite another to be constituted as a human being. Contrary to the ‘nominalist’ tradition that denied that in the givens of the world are essences that would and should guide their development, the Thomistic tradition insisted upon the reality of essences. These essences are the stable but dynamic structures that determine—or, in the face of human freedom, ask to determine—what is in, or what will come into, being.54

As John Finnis has noted, “In Aquinas’ philosophy, ‘form’ and formale refer to what is most essential to something being what it is—almost the exact opposite meaning from the modern idiomatic English ‘(mere) formality.’"55 Form, then, is what something is in its essence, while matter is more arbitrary, indeed, accidental.

In this usage, something can easily be “merely” material, but can hardly be “merely” formal. So understood, formal cooperation in sin is action that is the essence of sinful assistance in another’s sin, while material cooperation is action that does, as a factual matter, assist another to sin, but is not in its essence sinful assistance.

B. Cooperation and Related Doctrines

Overcoming this terminological hurdle, however, is only the first step to applying the doctrine of cooperation. Although the doctrine “offers a thorough calculus for moral decision making . . . many avoid it because . . . there is ‘no more difficult question than this in the whole range of Moral Theology.’”56

53. See S. Marc Cohen, Aristotle on Substance, Matter, and Form 8 (2004), http://faculty.washington.edu/smcohen/320/Metaphysics.pdf (“For Aristotle, the form of a compound substance is essential to it; its matter is accidental. (Socrates could have been composed of different matter from that of which he is actually composed.).”); AQUINAS, supra note 40, at 39 (referring to the “form which makes a thing what it is”); id. at 84 (“Early philosophers felt their way to the truth slowly step by step. They began somewhat crudely by thinking that only bodies we can sense exist, that the essential substance of such bodies [what they are] is uncaused, and that they change only [how they are] in inessentials. . . . Later they worked out the distinction within essential substance between its matter . . . and the form of substance taken on by such matter. . . .”)


I have found two approaches particularly helpful in getting a handle on the doctrine of cooperation and its applications. The first (which I develop in this Part) is to situate the doctrine of cooperation in the context of related doctrines of Catholic moral theology. The second (which I utilize in Parts III and IV) is to see how theologians have applied the doctrine in a variety of cases. I have found considerable help in both areas, to my surprise, in the manuals of moral theology, a genre that largely defined the field of moral theology for centuries, but that has fallen out of favor and largely died out in the wake of Vatican II.

These manuals were designed to prepare seminarians to hear confession. They resemble legal hornbooks, in that they are highly organized, set forth general principles, and explain how those general principles apply to particular cases. In the latter aspect, they are a form of casuistry, a term that has acquired rather negative connotations, but frankly bears considerable resemblance to the common law method. They have been roundly

57. See John A. Gallagher, Time Past, Time Future: An Historical Study of Catholic Moral Theology 29 (1990) (noting that the manuals "served as major instruments in the theological and ministerial education of Roman Catholic priests for almost four hundred years. They continued to be a major element in seminary education until the eve of the Second Vatican Council (1963–65)."),

The closest modern analogue can be found in Grisez, supra note 41, a work to which I have already referred and will do so further. Grisez offers far more discussion of any particular question than the manuals, but he has not chosen and structured those questions around particular moral principles; indeed, there is scant organization to the questions at all.

58. See, e.g., Richard M. Gula, Reason Informed by Faith: Foundations of Catholic Morality 26 (1989) ("The origins of Roman Catholic moral theology as a distinct discipline go hand in hand with the Council of Trent's decrees regarding the sacrament of penance."); id. (noting that the "manuals of moral theology" were handbooks for confessors, designed to provide instruction on "forming a proper conscience, on solving cases of conscience, and on making a precise determination of sins so as to make a proper confession").

59. Indeed, when moral theology was taught to seminarians from these handbooks, an exam in moral theology was like a torts exam, but rather than finding all of the torts in a complex factual scenario, the task was to find all the sins. (My description of such a moral theology exam is drawn from conversation with Fr. Frank McNulty, former professor of moral theology at Immaculate Conception Seminary.)

60. The Oxford English Dictionary defines casuistry as the "science, art, or reasoning of the casuist; that part of Ethics which resolves cases of conscience, applying the general rules of religion and morality to particular instances in which 'circumstances alter cases; or in which there appears to be a conflict of duties." Oxford English Dictionary (2d ed. 1989), available at www.oed.com (search for "casuistry"). While it notes that the term "often (and perhaps originally) applied to a quibbling or evasive way of dealing with difficult cases of duty," and offers the term "casuism" as a "term of more respectful application," it has no entry for "casuism." Id.

In his response to this paper, Professor Tamanaha joins the ranks of casuistry's critics. See Tamanaha, supra note 38, at 278 (referring to his suspicions about "casuistic analysis"); see generally Jenssen & Toulmin, supra note 38, at 11–13 (noting casuistry being in disrepute since Blaise Pascal's Provincial Letters in the mid-seventeenth century, and its rehabilitation in works such as Sissela Bok's Lying: Moral Choice in Public and Private Life (1978) and Michael Walzer's Just and Unjust Wars (1977)); id. at 69 (noting connection between casuistry and Anglo-American common lawyers); The Context of Casuistry (James F. Keenan & Thomas A. Shannon eds., 1995); Thomas R. Kopfensteiner, Science, Metaphor, and Moral Casuistry, in The Context of Casuistry, supra, at 207 ("In spite of the ample criticism of the casuistry found
within the neoscholastic manuals of theology, the casuist’s art of applying principles and norms to concrete situations and problems is still a necessary part of the moral enterprise.”).

Perhaps Professor Tamanaha finds himself more attracted to prophecy than casuistry. See Tamanaha, supra note 38 at 272 (claiming that “[c]asuistic reasoning allows participation in these sinful activities without violating church teachings and moral principles”). See generally Cathleen M. Kaveny, Prophecy and Casuistry: Abortion, Torture, and Moral Discourse, 51 VILL. L. REV. 499 (2006). Prophecy, of course, is a noble calling. Judges, however, are not prophets, they are casuists—they decide particular cases. See id. at 511 (“[L]awyers and judges in common law countries . . . engage in casuistical reasoning.”); see also ROBERT M. COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS 259 (1975) (“If a man makes a good priest, we may be quite sure he will not be a great prophet.”); Michael Stokes Paulsen, Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused, 7 J.L. & RELIGION 33, 96 (1990) (noting that “Bob Carver was a prophet, not a priest,” and that “[j]udges are bound to disappoint such a man”). For a prophetic call regarding judges and law professors regarding abortion and the death penalty, see Bruce Ledewitz, An Essay Concerning Judicial Resignation and Non-Cooperation in the Presence of Evil, 27 DUQ. L. REV. 1, 16 (1988) (suggesting that “it may not be possible to remain a judge at all in a society that allows, and encourages, abortion” and that the “law professor who teaches abortion’s pro’s and con’s, who teaches the reasoning of Roe v. Wade, is equally guilty of lending support to abortion”).

More generally, I find Professor Tamanaha’s description of a moral dilemma nearly unrecognizable. Tamanaha, supra note 38, at 278 (“We face moral dilemmas all the time. Often we experience a dilemma not because the course charted by the applicable moral principles is unclear, but because for one reason or another we would prefer not to follow that course.”) (emphasis omitted). Of course, there are situations when we know the right thing to do and must struggle against fear and selfishness to do the right thing. But such a moral struggle hardly qualifies as a dilemma. “Moral dilemmas, at the very least, involve conflicts between moral requirements.” Terrance McConnell, Moral Dilemmas, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2006), available at http://plato.stanford.edu/archives/sum2006/entries/moral-dilemmas. Some may reserve the term for situations where no morally-correct resolution is possible and argue whether such true moral dilemmas exist; others use the term more broadly for situations where there are competing moral demands, which can, on further analysis, be resolved. See id.; OXFORD ENGLISH DICTIONARY (2d. ed. 1989), available at www.oed.com (search for “dilemma”) (defining dilemma as a “choice between two . . . alternatives, which are or appear equally unfavourable”). Those competing moral demands include providing for oneself and one’s family, as well as participating in work, politics, and society in order to contribute to the common good.

Professor Tamanaha’s approach gives us no tools to deal with those competing demands. For example, how would Professor Tamanaha advise an American citizen who found the United States invasion of Iraq in 2003 to be unjust? Must she vote against any candidate who supported the invasion? Refuse to pay federal income taxes? Refuse to pay Social Security taxes? Move to France? Once in France, refuse to buy goods made in the United States? To say that moral principle requires all of these things strikes me as bordering on fundamentalist: once we identify an evil, the right thing to do is to avoid even the slightest connection to that evil no matter the competing moral demands. To say that some are permissible but others are not requires casuistry. Professor Tamanaha properly reminds us that casuistry, like all human reasoning, runs the risk of rationalization. See Tamanaha, supra note 38, at 270. But casuistry also involves the down-to-earth wrestling with particular cases, just as judges must do, but we academics have the luxury of avoiding if we choose. See also Kaveny, supra note 60, at 569 (noting that casuistry is “an effort to discern the appropriate course of action in the case at hand, in part by taking account of what has been judged the appropriate course of action in similar cases” and that one way in which “casuistry tends to go wrong” is when it is “employed disingenuously . . . to justify a decision that was reached on other grounds”); id. at 572 (“We cannot do without casuistry or practical reasoning about what to do in concrete cases.”); JONSSON & TOULMIN, supra note 38, at 92 (noting that “the kind of problem that generates casuistical thinking [is] a conflict of basic obligations”); id. at 127 (stating that the medieval term for what we call casuistry was *casus conscientiae*, that is, “cases of conscience”); cf. LEVINSON, supra note 9, at 237–38 (noting that one advantage to reading cases is
criticized as legalistic, too focused on the individual act rather than one’s overall fundamental commitments, and written from the perspective of a third-party analyzing another’s actions (a priest hearing confession) rather than the actor himself.61 However powerful these criticisms may be in general, these very same factors are actually of some advantage in this context. When the question is how a judge should behave, it is hardly a significant criticism that the proposed analysis is legalistic. When the question is how a judge should handle a particular case or set of cases, it is useful to be focused on individual actions rather than overall fundamental commitments. Indeed, since judges will typically face serious conflicts only rarely, the judge’s overall fundamental commitments are seldom at stake; instead, what is needed is guidance for particular situations and warning signs about particular situations that may, if not heeded, pose some threat to one’s fundamental commitments. Finally, since this essay is intended to be of use not only to judges but also to those who evaluate them, even the third-party perspective of the manuals can be an asset.

The doctrine of cooperation is closely related to two different aspects of Catholic moral theology, the duties associated with the virtue of charity and the principle of double effect. Indeed, there is a sense in which it sits at the intersection of these two ideas.

---

61. See, e.g., Martin Rhonheimer, *Intentional Actions and the Meaning of Object: A Reply to Richard McCormick*, 59 THOMIST 279, 304 (1995) (describing the “traditional manuals” as “rather legalistic, focusing on the external features of actions, referring them to positive law, and only secondarily applying some corrections to recuperate important intentional aspects”); cf. Richard A. McCormick, *Moral Theology 1940-1989: An Overview*, 50 THEOLOGICAL STUD. 3-4 (1989) (noting that the manuals were “all too often one-sidedly confession-oriented, magisterium-dominated, canon law-related, sin-centered, and seminary-controlled,” yet were also “very pastoral and prudent, critically respectful, realistic, compassionate, open and charitable, well-informed”); id. at 20 (noting that “there is pastoral wisdom there [in the manuals] that remains somewhat undervalued, largely because it is unknown”); Timothy E. O’Connell, *Principles for a Catholic Morality* 20 (rev. ed., HarperCollins 1990) (1978) (noting that although “one could hardly celebrate the manuals as paradigms of profound moral theology,” they “often functioned as voices of reason, guiding the confessor away from the extremes and toward the moderate position”). Disdain for casuistry within the Catholic Church dates back at least to the time of Saint Alphonsus:

There are some who pride themselves on being well read and on being theologians of high repute but who would not lower themselves to read the moral theologians: Casuists, they call them, with an insulting tone. They say it is enough, for hearing confessions, to have the general principles of moral theology, since with these all the individual cases can be solved. Who denies that all the cases have to be solved with principles? But, here is the problem: how to apply to individual cases the principles that are appropriate to them. This cannot be done without a serious discussion of the arguments on one and the other side. This is precisely what the moral theologians have done. They have tried to clarify which principles should be used in the resolution of individual cases.

i. Charity, Fraternal Correction, and Scandal

Charity is a "supernatural, infused virtue, by which we love God above everything for His own sake, and our neighbor as ourselves for God's sake."62 It imposes "duties over and beyond those of justice to our fellow creatures, whom we recognize as having the same nature, the same destiny, the same Redeemer as ourselves."63 Among the duties of charity are almsgiving and fraternal correction.64 Fraternal correction is a "private admonition given to another to withdraw from his sin or to prevent his sinning."65 Both of these duties are limited. One is not obliged in charity to sell all that he owns and give to the poor. Moreover, it "would be foolish to admonish all and sundry on every occasion."66 For the obligation to be serious, "the neighbour's necessity should be serious and actual, there should be reasonable hope of success, and no grave personal inconvenience to him who corrects."67 Indeed, admonition may be deferred for the sake of greater future good or in doubt as to success, and may be omitted altogether . . . when there are well-grounded fears lest the neighbour should be completely estranged by the correction, or when his sin or danger are uncertain, or when he is likely soon to correct himself, or when there are others who could equally well correct him.68

One of the sins against fraternal charity is scandal. In common parlance, scandal refers to some wrongdoing or embarrassing action that is uncovered. In Catholic moral theology, however, it refers to "an attitude or behavior which leads another to do evil."69 Typically, scandal operates by giving a bad example: if an otherwise good and respected person is doing x, then

62. NEW CATHOLIC DICTIONARY (1910), available at http://www.catholic-forum.com/Saints/nodc.htm (follow the "charity" hyperlink) (last visited Mar. 14, 2007); see also CATECHISM OF THE CATHOLIC CHURCH, supra note 11, No. 1822 ("Charity is the theological virtue by which we love God above all things for His own sake, and our neighbor as ourselves for the love of God.").
63. NEW CATHOLIC DICTIONARY, supra note 62 (follow the "charities" hyperlink).
64. CATECHISM OF THE CATHOLIC CHURCH, supra note 11, No. 1829 ("Charity demands beneficence and fraternal correction; it is benevolence; it fosters reciprocity and remains disinterested and generous.").
66. Id.
67. Id. at 328.
68. Id.
69. CATECHISM OF THE CATHOLIC CHURCH, supra note 11, No. 2284 ("The person who gives scandal becomes his neighbor's tempter."). While it is sometimes said that a scandalous act must have "at least the appearance of evil," 1 SLATER, supra note 50, at 198, it seems that scandal can arise from an act that lacks even the appearance of evil. See JONE, supra note 39, § 146 ("Actions good in themselves, which have not the appearance of evil, but which, nevertheless, give others occasion to sin, need not be omitted if the omission means great inconvenience."); 1 SLATER, supra note 50, at 201 ("A good action without any appearance of evil which is not prescribed, and which can without inconvenience be omitted, should be omitted when it would cause scandal. If it cannot be abandoned without some inconvenience, there is no obligation to abstain from it.").
maybe I’ll do x as well. Scandal is a “special sin against the precept of fraternal correction which obliges us to do what we can to rescue a fallen brother, whereas one who scandalizes his brother causes him to fall.” Significantly, it is quite possible an action that is itself perfectly permissible can scandalize another.

If I foresee that scandal is likely to be caused by an action of mine which has the appearance of being wrong, but which in fact is perfectly lawful, I am under the obligation of removing the danger of scandal by explaining my conduct, or omitting the action altogether if I can do so conveniently. If I cannot explain nor omit the action without serious inconvenience, I am justified in performing the action and permitting the scandal, for charity does not bind to one’s own serious inconvenience.

Cooperation is “[c]losely connected with scandal . . . indeed they are often treated of together.” The distinction between the two is that scandal refers to “leading others into sin,” while cooperation refers to being “involved in the wrongdoing initiated by another.” Someone cooperates in sin by facilitating or contributing to another’s wrongdoing; someone scandalizes another by inducing the other to sin. Despite this distinction, they are closely related, and both are aspects of charity. This connection to charity reveals that the doctrine of cooperation is not, as it sometimes appears, preoccupied with keeping one’s own hands clean, but rather concerned with helping one’s brother or sister avoid sin.

ii. Double Effect

The second aspect of Catholic moral theology to which the doctrine of cooperation is closely connected is the principle of double effect. That prin-

70. CATECHISM OF THE CATHOLIC CHURCH, supra note 11, No. 2285 (“Scandal takes on a particular gravity by reason of the authority of those who cause it or the weakness of those who are scandalized.”). See U.S. CATHOLIC BISHOPS, LIVING THE GOSPEL OF LIFE: A CHALLENGE TO AMERICAN CATHOLICS ¶ 32 (U.S. Catholic Conf., Inc. 1998) (“We urge those Catholic officials who choose to depart from Church teaching on the inviolability of human life in their public life to consider the consequences for their own spiritual well being, as well as the scandal they risk by leading others into serious sin.”).

71. 1 SLATER, supra note 50, at 198–99.

72. Id. at 200; see also 1 DAVIS, supra note 65, at 335 (“Temporals goods, if of small moment, should be given up to avert scandal; not, however, if they are considerable, for serious personal loss may outweigh the duty of charity to others, except in very serious matters.”).

73. 1 SLATER, supra note 50, at 203 (noting, in addition, that “on account of the importance of the latter it seems desirable to devote a special chapter to it”).

74. 3 GRISEZ, supra note 41, at 872.

75. See 1 DAVIS, supra note 65, at 333 (“Scandal is not given to one who is already determined to sin; not to one who would not at all be induced to sin by the bad example given.”).

76. Cf. Tamanaha, supra note 38, at 277 (claiming that my analysis will help judges to “keep their hands clean”). A person deciding whether it is wrong to cooperate with the sin of another should not be thinking, “How can I manage to let someone else do the wrong that I want done without implicating myself?” but rather, “What should I do, in light of my other moral obligations, to prevent someone else from doing wrong?”
principle provides the criteria by which to evaluate the permissibility of undertaking an act that has an evil effect. The four requirements of that principle are as follows:

1. The act itself must be good or at least morally indifferent. That is, the act must not be intrinsically evil.

2. A good effect must follow from the action at least as immediately as the evil effect. This criterion is aimed at avoiding the conclusion that a good end justifies an evil means.

3. The intention must be directed to the good effect exclusively.

4. There must be sufficient, or proportionate, reason for permitting the evil.77

At the heart of the doctrine is the difference between intending evil and accepting evil.78 A classic example of the principle involves the law of war.79 It is wrong to directly target noncombatants.80 However, one can attack a military target despite the knowledge that there will be noncombatant casualties if the criteria of the principle of double effect are met. If the attack on a military target is in pursuance of a just war, it is not an intrinsically evil act. In addition, if the good military effect is not obtained by means of the civilian casualties, but rather the civilian casualties are collateral to—a side effect of—that attack, the second criterion is met. The third criterion requires that those conducting the military action intend only the good military effect, not the noncombatant casualties. Finally, there must be sufficient (proportionate) reason to conclude that the evil of noncombatant casualties is acceptable in light of the good effect obtained. This fourth

77. See, e.g., Edward C. Lyons, In Incognito—The Principle of Double Effect in American Constitutional Law, 57 FLA. L. REV. 469, 482 (2005) (setting forth the requirements in somewhat different terms).

All moralists agree substantially on the statement of the principle, although some word it a little differently from others. . . . [I]n its full modern dress, it may be expressed as follows: A person may licitly perform an action that he foresees will produce a good and a bad effect provided that four conditions are verified at one and the same time: 1) that the action in itself from its very object be good or at least indifferent; 2) that the good effect and not the evil effect be intended; 3) that the good effect be not produced by means of the evil effect; 4) that there be a proportionately grave reason for permitting the evil effect.

Id. at 482 n. 48 (quoting Joseph T. Mangan, An Historical Analysis of the Principle of Double Effect, 10 THEOLOGICAL STUDIES 41, 42-43 (1949)).

78. CATECHISM OF THE CATHOLIC CHURCH, supra note 11, No. 1737 (“An effect can be tolerated without being willed by its agent; for instance, a mother’s exhaustion from tending her sick child.”); see, e.g., CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 89 (2000) (referring to the “familiar difference between intending a certain result and acting with the knowledge that the result will obtain”).


80. Id. at 264 (“Just war theorists disagree in their assessment of where to draw the line between combatants and noncombatants, but they agree that the deliberate targeting of noncombatants is immoral.”).
principle provides a basis for criticizing even unintended noncombatant casualties in a just war if they are disproportionate to the military end.

The principle of double effect similarly explains what the Catholic Church means when it condemns "direct" abortion but not indirect abortions. The point of the distinction between direct and indirect is not to distinguish between abortions caused by medical treatment and spontaneous abortions (or miscarriages). Instead, it is shorthand for the application of the principle of double effect. For example, surgery to remove a cancerous uterus, is, in itself, a good act. If there is a fetus within that uterus, such an operation would also produce the evil effect of killing that fetus. However, killing the fetus is not the means by which the good effect of removing the cancerous uterus is reached. So long as the bad effect is not intended, and so long as there are proportional reasons to accept the evil, the operation is permissible.

This principle of double effect is most familiar to constitutional lawyers from the physician-assisted suicide cases. In Vacco v. Quill, the Supreme Court held that "[j]ust as a State may prohibit assisting suicide while permitting patients to refuse unwanted lifesaving treatment, it may permit palliative care related to that refusal, which may have the foreseen but unintended ‘double effect’ of hastening the patient’s death." As Judge Kleinfeld put it (in a passage quoted in part by the Supreme Court):

When General Eisenhower ordered American soldiers onto the beaches of Normandy, he knew that he was sending many American soldiers to certain death, despite his best efforts to minimize

81. See Pope John Paul II, Evangelium Vitae, supra note 46, at No. 62 (“I declare that direct abortion, that is, abortion willed as an end or as a means, always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being.”).

82. Catechism of the Catholic Church, supra note 11, No. 2271 (“Direct abortion, that is to say, abortion willed as an end or a means, is gravely contrary to the moral law.”).

83. See, e.g., Jones, supra note 39, § 14 (“Therefore, an unmarried mother may not procure abortion to avoid disgrace. On the other hand it is lawful for a pregnant woman to take medicine which is necessary for her health even though this medicine will cause an abortion.”); Gallagher, supra note 57, at 101 (noting the permissibility, under traditional double effect doctrine, of excising a cancerous pregnant uterus). The application of traditional double effect doctrine to ectopic pregnancies led some to a distinction between cutting out the fallopian tube (permissible) and shelling the fetus out of the fallopian tube (impermissible) that many found difficult to accept. See Keenan, supra note 45, at 210.

84. 521 U.S. 793, 807 n.11 (1997) (citing New York Task Force on Life and Law, When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context 163 (1994), available at http://www.health.state.ny.us/nysdohlconsumer/patient/chap8.htm (“It is widely recognized that the provision of pain medication is ethically and professionally acceptable even when the treatment may hasten the patient’s death, if the medication is intended to alleviate pain and severe discomfort, not to cause death.”)); see also Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (upholding the constitutionality of a veterans’ preference, insisting that there is a difference between action taken “because of” its impact on women and one taken “in spite of” its impact on women); see generally Lyons, supra note 77, at 473 (arguing that the principle of double effect is “a valid principle of ethical deliberation” and “a pervasive, albeit generally unacknowledged, principle employed regularly in American case law”).
casualties. His purpose, though, was to liberate the beaches, liberate France, and liberate Europe from the Nazis. The majority’s theory of ethics would imply that this purpose was legally and ethically indistinguishable from a purpose of killing American soldiers. Knowledge of an undesired consequence does not imply that the actor intends that consequence. A physician who administers pain medication with the purpose of relieving pain, doing his best to avert death, is no murderer, despite his knowledge that as the necessary dosage rises, it will produce the undesired consequence of death. 85

So conceptually close are cooperation and double effect that some view the doctrine governing cooperation as basically an application of the principle of double effect. As Father Slater explained:

It is never lawful to cooperate formally with another’s sin, for it is obviously to wish evil, which is always sinful. Nor is it lawful to cooperate materially with the sin of another when the action of the secondary agent is itself wrong, as is also clear. But provided the action of the secondary agent is not itself wrong, but right, or at least indifferent, and he has no evil intentions, and furthermore there is a just cause for permitting the sin of the principal agent, material cooperation in the sin of another is not wrong. In such circumstances, the secondary agent does nothing that is wrong in itself; he foresees, it is true, that another will take advantage of his action in order to commit sin, but the secondary agent is only bound to prevent this out of charity, which does not bind with relatively serious inconvenience, and this is present whenever there is just cause for permitting the sin of the principal agent. This is merely the application of the principle of a double effect. 86

III. DISTINGUISHING JUDICIAL DECISIONS AS CONSTITUTING FORMAL OR MATERIAL COOPERATION

With this overview of formal and material cooperation, we can begin to analyze judicial actions. As harsh as it may seem, the daily grist of a judge’s work involves cooperation in sin. Acquitting a criminal defendant who, though guilty, was not proven guilty beyond a reasonable doubt assists that defendant in committing additional crimes. Granting summary judgment for a civil defendant sued for fraud because the plaintiff has no evi-

85. See Compassion in Dying v. State of Wash., 79 F.3d 790, 858 (9th Cir. 1996) (Kleinfeld, J., dissenting), rev’d, Wash. v. Glucksberg, 521 U.S. 702 (1997). In his view, the majority in the court of appeals was “exactly wrong” in saying that there is “‘little, if any, difference for constitutional or ethical purposes’ between providing pain killing medication for the purpose of relieving pain, knowing that it will at some dosage cause death, and providing medication for the sole purpose of causing death.” Jd.

86. Slater, supra note 50, at 203–04; see also 3 Grisez, supra note 41, at 873 (“the material cooperator’s act, if not wrong for some other reason, is wrong if, and only if, he or she should not accept the bad side effects of contributing to another’s wrongdoing”).
dence of reliance on the defendant’s misrepresentations similarly assists the defendant to engage in future frauds. Entering a judgment for a lying plaintiff who is nevertheless believed by the jury assists the plaintiff in unjustly enriching herself at the expense of the defendant. In such circumstances, it would be extraordinary to even suggest that the judge was engaged in formal rather than material cooperation, for formal cooperation would involve the judge intending the defendant to commit future crimes or frauds, or intending that the plaintiff recover unjustly.

All judicial actions in a given area of the law are not the same. Across the broad sweep of areas where Catholic teaching and American law conflict—whether the issue is contraception, abortion, fornication, homosexual conduct, the death penalty, marriage and divorce, property, welfare, or immigration—careful distinctions need to be made about the precise judicial action involved.

A. Capital Punishment

John Garvey and Amy Coney Barrett have made this point powerfully by undertaking a detailed analysis of the cooperation question in the context of capital punishment. They conclude that Catholic judges may not sentence individuals to death, but may preside over the guilt phase of a capital trial, affirm a death sentence on appeal, and refuse to disturb a death sentence on collateral review. They explain that an appellate judge, unlike a sentencing judge, can rightly say that “he does not intentionally direct or promote the defendant’s execution,” and thus is not engaged in formal cooperation.

On the other hand, they contend that a judge who sentences a defendant to death, whether based on a jury verdict or his own fact-finding, presents a “straightforward case of formal cooperation.” They state that a judge who enters an order sentencing someone to death intends, even if reluctantly, that the defendant be put to death. They reason that “[o]ne who gives an order cannot protest that he did not intend it to be carried out.”

They are certainly right that sentencing a defendant to death is usually formal cooperation in sin, and may be right that it always constitutes formal cooperation, but the picture is a bit more complicated. In an era when the

88. Id. at 306, 329.
89. Id. at 328.
90. Id. at 321.
91. Id.
92. Id.
93. An additional caveat (which they of course acknowledge, see id. at 313) is that the Church does not foreclose all possibility of the death penalty, but rather that “as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm—without definitely taking away from him the
Catholic Church taught the widespread permissibility of capital punishment, it nevertheless confronted a different problem: the conviction of an innocent man. Aquinas taught that a judge who knows that a man, who has been convicted by false witnesses, is innocent, he must, like Daniel, examine the witnesses with great care, so as to find a motive for acquitting the innocent: but if he cannot do this he should remit him for judgment by a higher tribunal. If even this is impossible, he does not sin if he pronounce sentence in accordance with the evidence, for it is not he that puts the innocent man to death, but they who stated him to be guilty.\(^9^4\)

In advising priests who ministered to those condemned to death, Saint Alphonsus—the patron saint of moral theology\(^9^5\)—stated that the unjustly condemned should be urged not to hate their judges.

\(^9^4\) THOMAS AQUINAS, SUMMA THEOLOGICA, Part II of the Second Part, q. 64 a. 6 (in vol. 3 of Fathers of the English Dominican Province trans., Christian Classics 1998). The context of this passage is that Aquinas is defending the proposition that “it is in no way lawful to slay the innocent” against the objection that “sometimes a man is forced, according to the order of justice, to slay an innocent person: for instance, when a judge, who is bound to judge according to the evidence, condemns to death a man whom he knows to be innocent but who is convicted by false witnesses.” Id.

Aquinas evidently envisioned judges deciding cases regarding which they had personal knowledge obtained outside the legal proceeding, and insisted that while judges could use such information to “more rigorously sift the evidence brought forward, and discover its weak points,” they must ultimately decide cases on the basis of the evidence acquired judicially. AQUINAS, supra, at q. 67, a. 2 (stating further that “it is the duty of a judge to pronounce judgment in as much as he exercises public authority, wherefore his judgment should be based on information acquired by him, not from his knowledge as a private individual, but from what he knows as a public person”); id. (“In matters touching his own person, a man must form his conscience from his own knowledge, but in matters concerning the public authority, he must form his conscience in accordance with the knowledge attainable in the public judicial procedure”). Under contemporary American practice, of course, a judge who has extra-judicial personal knowledge must recuse. See 28 U.S.C. § 455(b)(1) (2000) (requiring disqualification where the judge has “personal knowledge of disputed evidentiary facts concerning the proceeding”).

As horrific as we might find the notion of sentencing an innocent person to death, notice that Aquinas’s approach may, in some instances, be more favorable to an innocent person than contemporary American practice considering that Aquinas would permit a judge to rely upon personal knowledge to “rigorously sift the evidence” and “discover its weak points.” AQUINAS, supra, q. 67, a. 2. In contrast, contemporary American practice reduces a judge’s autonomy in such a situation to that of an ordinary witness. Moreover, much of the horror comes from the supposition that the judge “knows” that the defendant is innocent. If we imagine a more epistemologically realistic example of a judge who “thinks,” or “believes,” or “has good reason to conclude” that a defendant is innocent, then not only is the horror reduced, but we also must acknowledge that judges in the United States are not empowered to acquit defendants in a jury trial on this basis if a reasonable jury could properly find guilt. See FED. R. CRIM. P. 29; Jackson v. Va., 443 U.S. 307 (1979).

If those who are condemned insist that they are unwilling to pardon the judges who have unjustly condemned them, endeavor to convince them that the judges are obliged to mete out justice and to pronounce sentence according to the evidence given in the trial. So it is not fair to hate them.  

As Father Slater summarized the matter in 1908:

The judge . . . must pass sentence according to the evidence before the court, not according to his own private knowledge or views. He may know privately that an accused man is guilty, but he must not condemn him unless his guilt has been proved by the evidence. But what if the judge knows for certain that an accused man is innocent, and yet according to the evidence available he has been proved guilty? In such a case as this the judge must, of course, use all the means in his power to bring out the innocence of the accused party, or remit the case to another court. But supposing that he has done all in his power to avoid condemning the innocent man, and nevertheless the jury have found him guilty, and by law it only remains for the judge to pass sentence according to the verdict. Is he allowed to do so? This question was disputed among theologians. Some with St. Thomas taught that he might condemn the innocent man, for the witnesses were then guilty of injustice, not the judge, who did his duty in passing sentence according to law. Others denied that this is lawful, for to condemn the innocent, especially if there is a question of a death sentence, is intrinsically wrong. Others distinguished, and taught that it is indeed unlawful to condemn an innocent man to death even when by judicial process, he has been proved to all appearances guilty, but that when there is a question of a fine or imprisonment which may be suffered without sin the judge may pass sentence according to law, for this is for the public good. Practically, therefore, according to the principles of English jurisprudence, the judge may lawfully pass sentence even of death in such a case, but he is bound afterward by making representations to the proper authority to do what he can to clear the innocent party.

Thus there is substantial authority in Catholic moral theology to conclude that a judge who believes someone to be innocent, but nevertheless convicts him in accordance with the law, is not necessarily engaged in formal cooperation with sin. By analogy, a judge who sentences someone to

---

96. LIGOURI, supra note 61, at 335; see also John T. Noonan, Jr., Abortion and the Catholic Church: A Summary History, 12 NAT. L. FORUM 85, 108 (1967) (describing Alphonsus Liguori's work as a "masterly summation of the work of the casuists").

97. 1 SLATER, supra note 50, at 585–86; see also John D. Davis, The Moral Obligations of Catholic Civil Judges, 69–71 (1953) (doctoral dissertation, Cath. Univ. of Am.) (describing the competing and permissible strands of thought on this question); cf. id. at 127–28 (noting statement of Pope Pius XII that in some circumstances a judge “may inflict a penalty for transgression of an unjust law,” but not “in the case of condemnation to death”).
death in accordance with the law is not necessarily engaged in formal cooperation with sin.

Moreover, there is a substantial basis for concluding that it is possible for a judge to enter an order while not intending that it be carried out. That is an apt description of a judge who does what Slater recommended: pass sentence but afterward make representations to the proper authority in an attempt to clear the innocent defendant. 98

It is important to note that my disagreement with Dean Garvey and Professor Barrett is rather narrow. I do not take the strong position that imposing a death sentence is not formal cooperation, but rather only that there is a substantial basis for concluding that it is not. 99

In commenting on this article, Professor Barrett emphasized that a death sentence is an order, not a recommendation, and that a judge who enters such an order is ordering someone in the executive branch to execute the defendant. This position, however, may rely too heavily on the form of a judgment of sentence of death. That is, although a death sentence takes the form of an order to the executive, the executive is generally free to decline to enforce that order without the risk of contempt. This is certainly true in the federal system, where the President has the power of pardon and clemency. 100 So understood, a judgment of sentence of death is less com-

98. For example, Judge Charles R. McGrath asked Governor Arnold Schwarzenegger to grant clemency to a man whom McGrath had sentenced to death. See Henry Weinstein, Judge Requests Clemency for a Killer He Condemned, L.A. TIMES, Jan. 27, 2006, at A1. Judge McGrath's reason for advising clemency, however, is information that came to light after the judgment was entered. Id. The Committee on Codes of Conduct advises federal judges that

a personal recommendation for Presidential commutation of sentence or pardon . . . in response to a prisoner's request [is] normally advisable . . . [b]ecause recommendations sought as personal favors would be addressed to the Justice Department, and . . . that Department is a frequent litigant before federal judges, [thus] the potential exists that undue influence would be felt.

65 Op. Comm. on Codes of Conduct (Aug. 25, 1980), available at http://www.uscourts.gov/guide/vol2/65.html. The Committee specifically noted, however, that its advice "does not relate to a judge's transmission (without recommendation) of objective information which the Justice Department may not have and which would assist it in making its determination." Id.

99. By staying close to Aquinas, Saint Alphonsus, and traditional manuals of moral theology, this approach hardly runs the risk of proportionality. Cf. Charles E. Curran, Cooperation: Toward a Revision of the Concept and its Application, 41 LINACRE Q. 152, 156-57 (Aug. 1974) (noting that Alphonsus "presents the framework within which cooperation has been discussed in Roman Catholic theology to the present time" but suggesting a revision to that traditional framework).

100. U.S. CONST. art. II, § 2, cl. 1 (giving President the power to "grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment"); see also Biddle v. Perovich, 274 U.S. 480, 487-88 (1927) (upholding power of President to commute sentence of death to life imprisonment without the consent of the convict); Schick v. Reed, 419 U.S. 256, 279-80 (1974) (upholding power of President to commute sentence of death to life imprisonment without parole even though life imprisonment without parole was not a legislatively authorized punishment for the offense). The power of the executive in some jurisdictions is more limited. See, e.g., TEX. CONST. art. IV, § 11(b) ("In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and pardons.").
mand and more permission; not so much commanding that the executive kill as adjudicating that the law permits the executive to kill. In the terms preferred by Professor Barrett, such a judge adopts the proposal to “enter judgment that, in accordance with the law, the executive is empowered to execute the defendant.”

B. Marriage and Divorce

Similar questions regarding judicial cooperation also arose in the past in the context of marriage and divorce. Presiding over a civil marriage is neither intrinsically wrong nor formal cooperation in sinful actions of the couple.

As a civil official a Catholic may without further ado co-operate in a civil marriage if the parties are willing to be married before the Church after the civil ceremony. A grave reason is required for such co-operation if he is certain that they will not be married subsequently in the Church. Some authors even think he may co-operate for an extremely grave reason when there is an indispensible impediment, e.g., marriage bond.

In other words, presiding over a civil marriage—even when it was clear that the couple would engage in what the Church considers fornication or adultery—is not formal cooperation in those sins.

Father Slater, writing in 1908, observed that “[a] judge, who is merely the mouthpiece of the legislator and administers law ready made, may often co-operate in administering an unjust law, for otherwise he would have to resign his office.” He explained that while a judge could not give “judgment for divorce . . . and openly declare[ ] that he did so, in order that the parties or party might remarry,” he could, for a grave reason, “pronounce sentence of divorce in accordance with law.”

Father Jone later taught that

---

101. Viewed in this light, the sentencing judge is analogous to the appellate judge: both are deciding whether another juridical person, under the law, has the authority to take particular action. Cf. Garvey & Coney [Barrett], supra note 43, at 328 (“To affirm the sentence is not to approve it, but to say that the trial court did its job. What the court of appeals really decides is that the responsibility for life and death lies somewhere else.”).

102. See generally Davis, supra note 97, at 167–201 (discussing the various aspects of the Church’s teaching on marriage and divorce, and the responsibilities of Catholic judges in a wide range of divorce cases).

103. Jone, supra note 39, § 660.

104. 1 Davis, supra note 65, at 349 (noting that in “the case of Catholics who are obliged to contribute to undenominational schools as well as to build their own—the subject who suffers injustice is willing to suffer to avoid a greater evil”).

105. Id. at 349–50 (noting that “[a] judge who urges a woman to give her adulterous husband his freedom to re-marry is urging what is wrong”). Davis stated that a civil sentence of divorce did not mean a “divorce a vinculo—a matter with which the civil law does not concern itself—but means that no action for bigamy will arise if the parties re-marry.” Id. Given his acknowledgment that a civil divorce would permit the parties to remarry civilly, it appears that Davis was not addressing the civil law distinction between divorce a vinculo and divorce a mensa et thoro, but rather asserting that a civil law divorce would not, in the Church’s eyes, dissolve the marriage.
"[a] Catholic magistrate who by reason of his office must accept a divorce case may, according to a probable opinion, co-operate in granting the divorce, since he may consider the divorce a mere civil formality like civil marriage itself." 106 So understood, granting a civil divorce is not formal cooperation in sin. 107 Pope John Paul II reflected this same understanding when, in an address to the Roman Rota, he stated:

[Professional in the field of civil law should avoid being personally involved in anything that might imply a cooperation with divorce. For judges this may prove difficult, since the legal order does not recognize a conscientious objection to exempt them from giving sentence.

For grave and proportionate motives they may therefore act in accord with the traditional principles of material cooperation. 108

This does not mean that there is no imaginable judicial action concerning marriage and divorce that would constitute formal cooperation. 109 To use Father Slater's example, a judge who gave a judgment for divorce precisely in order to enable the party to remarry would be engaged in formal cooperation. Similarly, Father Jone taught that a judge may never order

See also Davis, supra note 97, at 125 (quoting Pope Pius XII as stating that a judge "can in no case expressly recognize and approve an unjust law," and therefore "cannot pronounce a penal judgment which would be equivalent to such approval"); id. at 126–27 (explaining that a "judge can never say or do anything which would indicate his personal approval or favor of the unjust law," that "not every application of an unjust law necessarily means its recognition and approval," and that Pius is "appl[y]ing the moral principles of cooperation").

106. Jone, supra note 39, § 766.

107. Professor Tamanaha complains that this analysis fails to acknowledge that an order granting a divorce is a performative act. Tamanaha, supra note 38, at 275. It does nothing of the kind. I agree a civil judge issuing an order of divorce has ended the civil marriage. The point is that such an order, while it dissolves the marriage for purposes of the civil law, does not dissolve the marriage as the Church understands marriage. That is, as far as the Church is concerned, the couple remains married. See Catechism of the Catholic Church, supra note 11, No. 1640 ("Thus the marriage bond has been established by God himself in such a way that a marriage concluded and consummated between baptized persons can never be dissolved. This bond, which results from the free human act of the spouses and their consummation of the marriage, is a reality, henceforth irrevocable."); see also Davis, supra note 97, at 188 (explaining that a Catholic judge, in granting a divorce, need not be engaged in formal cooperation because all he is doing is declaring "that in the eyes of the state the persons are no longer considered husband and wife" while knowing that "he breaks not the real bond but only the civil bond").

If it seems odd to imagine that someone is married for purposes of one body of law, but not married for purposes of another body of law, consider that this is precisely the situation of married gay couples in Massachusetts. They are married as a matter of Massachusetts law, but not married as a matter of federal law. See 1 U.S.C. § 7 (1996) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife.").


109. 1 Davis, supra note 65, at 349 (noting that in "the case of Catholics who are obliged to contribute to undenominational schools as well as to build their own—the subject who suffers injustice is willing to suffer to avoid a greater evil").
someone "to live conjugally with a person to whom one is not married before God." 110

C. Abortion

A detailed analysis is appropriate even in the extraordinary context of abortion, for all judicial decisions involving abortion are not the same in terms of cooperation. And even the very same outward judicial behavior may constitute formal or material cooperation, depending on what the judge intends. 111

Consider an extreme case: An assistant United States Attorney files a criminal complaint against a Planned Parenthood clinic for performing first trimester abortions. There is, however, no federal statute prohibiting first trimester abortions. Moreover, it has long been established that there is no federal common law of crimes. 112 Although dismissing the complaint certainly makes it easier for Planned Parenthood to continue performing abortions, the judge who does so is not necessarily formally cooperating in sin. His action of dismissing the complaint is, in itself, not intrinsically evil. He can take that action without intending that Planned Parenthood perform abortions. The judge would be guilty of formal cooperation if he dismissed the case, not simply because he intended to decide the case in accordance with the law, but because he intended that the defendant perform direct abortions. But there is no reason to infer this intent from the mere dismissal of the complaint.

Next, consider a case in which Congress has passed a law prohibiting all abortions and a criminal prosecution is brought under that statute. Even putting Roe 113 and Casey 114 aside, the case would present the legal question whether Congress has the power, under the Commerce Clause or Section 5 of the Fourteenth Amendment, 115 to enact such legislation. If a judge were to decide that Congress lacked such constitutional power, it would no more necessarily constitute formal cooperation than the first example. While the legal questions would be more difficult than in the first example, the moral question of whether a decision for the defendant involved formal cooper-

110. JONE, supra note 38, § 154; see also Davis, supra note 97, at 122 (quoting Pope Pius XII, Address to Union of Italian Catholic Jurists (Dec. 22, 1949) (stating that a "judge may never by his decision oblige anyone to commit an act intrinsically immoral"); id. at 123 (stating that a judge "can never by a decision oblige a person to deny the existence of God, to blaspheme God, or to take the life of an innocent person, or command that eugenic sterilization be inflicted on another").

111. See 3 Grisez, supra note 41, at 874 (distinguishing between a police officer who prevents pro-life workers from talking to women approaching abortion clinics because he wants women to have abortions and a police officer who does the same thing because she does not want to lose her job by refusing the assignment).


tion would not be. Precisely the same analysis would apply. Now, imagine a case in which a state statute prohibits all abortions, but the state constitution expressly protects a right to have an abortion within the first twelve weeks of gestation. Planned Parenthood brings an action seeking an injunction against enforcement of that statute. Is a judge who issues the injunction formally cooperating in evil? Again, the answer is not necessarily. Issuing an injunction against enforcement of an unconstitutional law is not intrinsically evil. And a judge who issues such an injunction need not intend that Planned Parenthood perform any abortions.

How about the cases that confront lower court judges today under Roe and Casey? A state legislature enacts a statute prohibiting abortions under some circumstances. Planned Parenthood brings an action seeking an injunction against enforcement of the statute. In some such cases—ones clearly governed by binding precedent—the legal questions will be easy. In other cases, the legal questions will not be easy. But whether the law is clear or not, a decision that the law is unconstitutional is, as we have seen, not necessarily formal cooperation in evil. The source of the legal rule (whether the Federal Constitution, a state constitution, or the simple absence of any legal prohibition) and the clarity of the legal rule do not affect the moral distinction between formal and material cooperation.

The same principle obtains at the Supreme Court: While the freedom that the Supreme Court has to overrule its own prior precedent makes the legal questions more difficult, it does not alter the conclusion that finding a law unconstitutional does not necessarily constitute formal cooperation in the evil that the law sought to avoid. More generally, a judicial decision that determines the legal allocation of power is not necessarily formal cooperation in the sins of those to whom the law allocates the power. 116

On the other hand, there are judicial determinations regarding abortion that do constitute formal cooperation. 117 Consider the judicial bypass system that the Supreme Court has insisted must be made available for minors who seek an abortion and do not want to comply with a statute requiring parental consent. 118 In that system, the minor can obtain an abortion if she either convinces the judge that she is mature enough to make the decision on her own or, failing to convince the judge of her maturity, the judge concludes that an abortion without parental consent would be in her best

116. See Gerald V. Bradley, Natural Law, in Christian Perspectives on Legal Thought 290 (Michael W. McConnell, Robert F. Cochran, Jr., & Angela C. Carmella eds., 2001) (noting that Justice Scalia interprets the United States Constitution to allow states to either prohibit or permit abortion and stating, "that some states would use their authority under the Constitution to enact unjust abortion laws does not necessarily indicate that Justice Scalia intends that they do so.").

117. Cf. Davis, supra note 97, at 147 (arguing that a judge who "command[s] that a eugenic sterilization be performed [is] a formal cooperator in commanding an intrinsically evil action").

interests.\textsuperscript{119} States have established similar bypass provisions in statutes requiring parental notification as well.\textsuperscript{120}

In the first circumstance, although the judge is obviously providing important assistance to the girl, the judge need not intend that the abortion take place. Indeed, such a judge may no more intend that the abortion take place than does a priest from whom the same girl sought advice in confession; both judge and priest acknowledge they have no legal authority to stop her from acting.

However, in the second circumstance, for a judge to conclude that an abortion would be in the girl’s best interest and issue an order bypassing parental notification or consent, the judge would have to intend that the abortion take place. This conclusion is straightforward if one believes that a judge must intend that his orders be carried out. Yet even if one believes that a judge does not necessarily intend that his order be carried out,\textsuperscript{121} a determination that an abortion is in someone’s best interests constitutes a decision that an abortion should take place.

Some might object that the judge does not actually order that an abortion take place, in that the girl is free to change her mind even after obtaining the order. Indeed, some might say that all the judge is doing is waiving the requirement of parental notification or consent, thereby permitting the girl to make the decision herself.\textsuperscript{122} The problem with this approach is that the very premise of the second situation is that the girl is not sufficiently mature to make the decision herself. For a judge to (1) conclude that a girl is insufficiently mature to make the decision herself; (2) conclude that parental involvement is not in her best interests; (3) authorize her to consent to an abortion; but not (4) decide whether an abortion is in her best interests, would be to simply abandon a girl to make a decision that she is not mature enough to make. It is far more reasonable to conclude that “a judicial bypass procedure requiring a minor to show that parental notification is not in her best interests is equivalent to a judicial bypass procedure requir-

\textsuperscript{119} Id. at 643–44.

\textsuperscript{120} See, e.g., Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) (upholding a judicial bypass mechanism that complied with \textit{Bellotti} in the context of parental notification, without deciding whether bypass for parental notification is constitutionally required); \textit{see also} Ayotte v. Planned Parenthood of New England, 126 S.Ct. 961, 966 n.1 (2006) (noting that “[f]orty-four States, including New Hampshire, have parental involvement (that is, consent or notification) laws”).

\textsuperscript{121} See \textit{supra} Part II.

\textsuperscript{122} Some form orders seem to suggest that all a judge need do is find that the notification would not be in the girl’s best interests, and order that the girl be authorized to consent to the abortion. \textit{See, e.g.}, Judgment and Findings of Fact and Conclusions of Law on Application in Parental Notification Proceedings (Form 2D), \textit{available at} http://www.janesdueprocess.org/legal_process/form_2d.pdf (Texas); Order Granting/Denying Waiver of Parental Consent for an Abortion, \textit{available at} http://www.courts.michigan.gov/SCAO/courtforms/abortionwaiver/sa/index.htm (select “Order Granting/Denying Waiver of Parental Consent for an Abortion”) (Michigan).
ing a minor to show that abortion without notification is in her best interests."123

So understood, in this second circumstance, a judge would, in the vast majority of cases, be formally cooperating with sin.124

IV. DETERMINING THE PERMISSIBILITY OF MATERIAL COOPERATION BY JUDGES

Of course, simply because a judicial decision does not constitute formal cooperation in sin hardly makes it morally permissible. Material cooperation in sin is sometimes permissible, but not always. Moreover, while the "cases to which this doctrine may be applied are very numerous," their safe application is difficult and attended with risk. The chief difficulty lies in determining the gravity of the cause which will justify one in cooperating materially in another's sin. No general rule can be laid down on the point beyond saying that a graver cause is required when there is a question of a graver sin, when the cooperation is more proximate, and when it is more probable that the sin would not be committed at all if the cooperation were denied.125

Many factors are relevant to determining the legitimacy of material cooperation:

the spiritual character and needs of another, our relations to him, what and how great is his offense against God, the harm that may accrue to a third person, the public harm likely to ensue, how close the co-operation, how indispensable it may be. . . . Great varieties of opinion, therefore, on any given case except the most obvious, are inevitable, and there is no more difficult question than this in the whole range of Moral Theology.126

In addition, proximity can be sliced rather thin, with distinctions drawn between immediate, mediate, proximate, and remote material coopera-

123. Lambert v. Wicklund, 520 U.S. 292, 297 (1997) (per curiam). The concurring Justices in Wicklund, however, thought that the plain language of the statute involved in that case "makes it passably clear that a showing that notification is not in the minor's best interest is alone sufficient," without expressing any concern that this construction abandons the girl to make a decision that she is immature to make. Id. at 302 (Stevens, J., joined by Ginsburg and Breyer, JJ., concurring in the judgment); see also Teresa Stanton Collett, Seeking Solomon's Wisdom: Judicial Bypass of Parental Involvement in a Minor's Abortion Decision, 52 BAYLOR L. REV. 513, 579 (2000) (noting that for a court to inquire only whether parental notification is in the girl's best interests, but not decide whether the abortion is in her best interests is to "irresponsibly desert the immature minor to make a decision the court has already determined she is ill-equipped to make").

124. The reason for the qualification is that the Catholic Church teaches, pursuant to the principle of double effect, that indirect abortions may be permissible.

125. 1 SLATER, supra note 50, at 204.

126. 1 DAVIS, supra note 65, at 342.
tion. To illustrate: helping a burglar to empty the jewels that he is stealing into his bag is immediate material cooperation, holding the ladder for the burglar to climb up to a window is proximate material cooperation, while purchasing tools for a burglar is remote material cooperation.

A. Material Cooperation in Other Walks of Life

Before turning to the particular situation of judges, consideration of particular cases involving people from a wide range of walks of life helps both to flesh out the idea and provide context. Because the casuistic genre of the manuals has largely died, however, many of the cases are rather archaic. In some circumstances, the archaism may seem quaint; in other circumstances, it may be offensive, particularly because the manuals were written prior to the Church’s recognition of religious liberty. One of them, however, seems ripped from the current headlines: “Clerks in a drug store may never advise customers in the purchase of contraceptives, but to keep their positions they may sell these things to those that ask for them.”

Architects may design a building for non-Catholic worship for a “very good reason,” while “a lesser reason justifies the ordinary laborer to work on such buildings.” Moreover, legislators “may vote public funds for the erection of a Protestant church if it be in the interest of religious harmony.” While it is not permissible to print, publish, or edit publications inimical to faith or morals, linotyping or proofreading is permissible proximate cooperation if one cannot otherwise make a living. Actions such as preparing and feeding the paper, mixing the ink, and operating the presses are permissible for a “moderately grave” reason. Remote cooperation, such as selling ink, paper, and machinery to such printing establishments is permissible for the sake of profit.

Where immoral shows and dances are concerned, the musicians need some weighty reason to cooperate, while those that keep the theater or hall in repair cooperate only remotely and need a less weighty reason. Policemen who must be present on duty are excused. How strong a reason an owner of property needs to rent property for such purposes depends on whether other locations are readily available.

---

127. See Jones, supra note 38, § 147; Davis, supra note 65, at 341–42; cf. 3 Grisez, supra note 41, at 890 (noting that his analysis departs from Alphonsus and the manualists “mainly in regard to the moral significance of proximity—that is, of how closely the cooperators’ outward behavior involves him or her in the wrongdoer’s outward behavior carrying out his or her bad choice,” but that this difference is not all that great because “closeness of involvement correlates more or less well with many of the factors affecting the strength of reasons not to cooperate”).
128. 1 Davis, supra note 65, at 341–42.
129. Jones, supra note 39, § 152.
130. Id. § 148.
131. Id.
132. Id. §§ 148–150.
133. Id. § 151.
Domestics may prepare meat on a day of abstinence for an employer, and serve alcohol despite knowing that the employer will become intoxicated. Similarly, employees may procure immoral books for employers. Taxi drivers can bring passengers to houses of ill-repute, because, "on the one hand, they cannot hinder sin anyway, and, on the other, their refusal would mean considerable loss to themselves."\textsuperscript{134} A workman may, for very serious need, manufacture Masonic emblems, since the emblems are, in themselves, indifferent.\textsuperscript{135}

In selling things that can be used for good or ill, if the buyer's intention is manifestly sinful, the sale is permissible only if there is some grave inconvenience in refusing to sell, apart from the loss of profit. Where a buyer's intention is not manifestly sinful, and the product is ordinarily used for sinful purposes, the seller should assure himself that the object will not be put to a bad use, if he can do so without grave inconvenience. However, a "serious loss of custom would excuse the seller both from making inquiries and refusal to sell in this case."\textsuperscript{136} Finally, for those very few things that have only a sinful use, formal cooperation is usually present.\textsuperscript{137} Yet even here,

we must be on our guard not to exaggerate, for if the purchaser can easily get the article elsewhere, and if he is quite determined to use it, the seller may refuse to associate himself with the intention of the purchaser, and since the sale is material co-operation—though it may be proximate on occasions—a very serious reason would justify the seller in not preventing the sin of another, for this obligation is one of charity, and the seller has also the duty of charity to himself.\textsuperscript{138}

\textsuperscript{134} Id. § 152; see also 1 Davis, supra note 65, at 348-49:

There are many ways in which a servant is asked to cooperate and render assistance to masters or mistresses when these sin. It will always be advisable and sometimes obligatory to try to find another occupation. But, meanwhile, the general principles of remote and proximate co-operation may be applied. In no case may the servant wish the sin, and in no case may the servant do what is, in itself, sinful. But most cases of their co-operation are only remotely material. In those cases which are exceedingly proximate, and in those which inflict harm on a third party, only the gravest cause would excuse. In no case would it be permissible for a servant to seek a prostitute for the master, and declare the purpose of the invitation, nor compose letters to that effect. But to issue the invitation verbally or by letter, without expressing the purpose, would be defensible, since this action is, in itself, not an evil act, nor does it necessarily imply an evil purpose. A very grave cause would excuse.

\textsuperscript{135} 1 Davis, supra note 65, at 346.

\textsuperscript{136} Id. at 347.

\textsuperscript{137} Id. at 346 (noting that it is "usually sinful to sell" such items, "for co-operation in the evil intention of the buyer is present. It is absurd to say that one's intentions are good, that sale is only for profit, that it is no concern of ours what the buyer is going to do with the articles bought. The very sale of an article that has only a sinful use makes sin possible."); cf. id. at 348 (stating that a wife can ask for intercourse even if her husband habitually withdraws because the intercourse is "normal and legitimate at its inception" but cannot do so if he uses contraceptive instruments because such intercourse is "always wrong from its inception").

\textsuperscript{138} Id. at 346. Although Davis is less than pellucid here, it appears that he views it as possible even in these circumstances for the seller to dissociate himself from the buyer's intention,
Where sinful surgery is concerned, material cooperation—sterilizing or setting out the instruments, preparing the patient for operation, or even administering an anesthetic or keeping the patient quiet during an operation—is permitted for a very serious reason. "These actions are all indifferent morally, and all of them cases of material co-operation. But a graver excusing cause would be required where the co-operation is more proximate."

A major concern in material cooperation is avoiding scandal. For example, in the context of selling things that have only a sinful use, "if there should be general scandal were it known that Catholics sold such things, for that reason that sale should be discontinued." Similarly, in the context of sinful operations,

[s]candal should be precluded, and it is normally easy to preclude it by letting others know that such co-operation does not imply approval of the operation, but that if they cannot be prevented, and if they will be performed in any case, the co-operation is allowed, if there is a grave reason for co-operating.

B. Material Cooperation by Judges

As we have already seen, a judge "may often co-operate in administering an unjust law." As that statement suggests, and as the following demonstrates, Catholic moral theology has traditionally permitted considerable material cooperation in sin by judges. Although some theologians maintained that a Catholic judge could not apply an unjust law, even one that imposed a fine or imprisonment, others held that

for grave reasons, as for example, if no Catholic could otherwise accept the office of judge, sentence may be passed according to such a law. The person unjustly condemned must patiently submit for the public good, especially as he would not escape even if Catholic judges refused to execute the law.

thereby making the cooperation material rather than formal. See also 3 Grisez, supra note 41, at 890 (noting the division among manualists regarding immediate cooperation and that "part of the grave injustice of the suffering and death imposed on Jesus was parading him as a criminal to Calvary, and he cooperated in that injustice by carrying his cross—immediate material co-operation in a grave injustice.").

139. 1 Davis, supra note 65, at 347–48.
140. Id. at 346, 347 n. 1 (Noting, evidently on the grounds of scandal, that "no chemist may stock contraceptives or abortifacients, nor may he sell them as agent for a firm. Female pills are abortifacients, being violent purgatives. The case is perhaps different for an assistant. Most authors, however, condemn the sale of contraceptives even by an assistant, on the ground, we believe, of co-operation. Some permit the sale by an assistant for a very urgent reason, scandal apart, if the articles can be got elsewhere.").
141. Id. at 348.
142. Id. at 349.
143. 1 Slater, supra note 50, at 587–88.
Indeed, in the era when capital punishment was more generally permitted by Catholic teaching, a major distinction drawn regarding such cooperation was between capital cases and other cases.

A judge may inflict a penalty on the transgressor of an unjust law if there is a question of only a slight punishment and there is no prospect of the law's being repealed by concerted resistance on the part of the better citizens. In such a case the condemned cannot reasonably object to the sentence; this is especially applicable if the common good demands that a good judge remain in office. But a judge may never in such a case deprive a criminal of an inalienable right or possession, e.g., his life.144

We have already seen Garvey and Barrett's conclusion that—in light of current teaching regarding capital punishment—Catholic judges may not sentence individuals to death, but may preside over the guilt phase of a capital trial, affirm a death sentence on appeal, and refuse to disturb a death sentence on collateral review.145 They find the material cooperation involved in the latter set of situations to be permissible.146 We have also seen some reason to question their conclusion, however, that imposing a sentence of death is itself formal cooperation.147 Yet even if sentencing someone to death is only material cooperation, it is rather closely involved with a grave harm—the actual execution—and would be impermissible absent rather strong reasons to accept the death as a side effect. One possible reason might be if there were a serious risk that the refusal of Catholic judges to hear capital sentencing proceedings would skew those proceedings toward death sentences. If, in a particular jurisdiction, that result were likely, such material cooperation may be permissible; otherwise, Garvey and Barrett's bottom line conclusion that Catholic judges should not impose sentences of death appears correct.

In evaluating the permissibility of the range of material cooperation in abortion by judges discussed above, the gravity of the wrong is an important factor suggesting the wrongfulness of the cooperation. On the other hand, in all but the judicial bypass situation, the judicial action is remote from the underlying wrong. Moreover, in all but the judicial bypass situation, it is not clear how much the judicial decision will, in fact, contribute to the underlying wrong. It also seems unlikely that judicial decisions contribute significantly to the obstinance of abortion providers. In addition, it is an important and good thing for judges to decide cases, including constitutional cases, according to law.

Significantly, there is little likelihood that a Catholic judge's refusal to handle such abortion cases will actually prevent the underlying wrong: if

144. Jone, supra note 39, § 154.
147. See infra Part III.A.
they refuse, different judges will be brought in to decide the cases in accordance with the law. As with taxi drivers bringing johns to houses of prostitution (or indeed, taxi drivers bringing women to abortion clinics), if one refuses, another will be found to do it. Worse, if Catholic judges refuse to hear abortion cases because of the risk of material cooperation, their legal perspective on such issues will be lost to the courts.148 Losing the legal perspective of Catholic judges—including Chief Justice Roberts and Justices Scalia, Thomas, Kennedy, and Alito—is hardly likely to reduce the incidence of direct abortion.149 (The possibility of one-way recusal is discussed below.)150

There is some risk of harm to the judge from repeated material cooperation.151 But the vast majority of judges will handle few abortion cases, certainly in comparison to the other cases they handle, making it unlikely that these cases pose any particular problem to the judge over the long run. If a particular judge, for some reason, hears a large number or high proportion of abortion cases, this might be of some concern. Again, the most

148. Cf. 1 Slater, supra note 50, at 587–88, noting the teaching that
for grave reasons, as for example, if no Catholic could otherwise accept the office of
judge, sentence may be passed according to such a law. The person unjustly condemned
must patiently submit for the public good, especially as he would not escape even if
Catholic judges refused to execute the law.

149. See Keenan, supra note 45, at 209 (noting that in certain cases of cooperation, including
that of judges, considerations include the "possible harmful effects on the common good should
the person refrain from acting"). Thus the doctrine of cooperation does not "shunt[] to the back­
ground" everything but the individual making the decision; see Tamanaha, supra note 38, at 276
12.

150. See infra Part V.

151. See 3 Grisez, supra note 41, at 879–80. The harm referred to here includes such things
as insensitivity to injustice, diminished solidarity for the victims of injustice, and the loss of ability
to offer credible witness against wrongdoing. Id. Thus it is not some narrow self-interest (unless
one thinks that doing the right thing for the sake of one's soul constitutes narrow self-interest).
Indeed, concerns about repeated material cooperation with evil may offer some insight into
Justice Blackmun's ultimate refusal to "tinker with the machinery of death." See Callins v. Coll­
ins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting)
From this day forward, I no longer shall tinker with the machinery of death. For more
than 20 years I have endeavored—indeed, I have struggled—along with a majority of
this Court, to develop procedural and substantive rules that would lend more than the
mere appearance of fairness to the death penalty endeavor .... I feel morally and intel­
lectually obligated simply to concede that the death penalty experiment has failed.
But see Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 922–23 (1992) (Blackmun J.,
concurring in part, dissenting in part) ("All that remained between the promise of Roe and the
darkness ... was a single, flickering flame ... I fear for the darkness as four Justices anxiously
await the single vote necessary to extinguish the light.").
Perhaps ironically, the risk of repeated material cooperation may be greatest at the Supreme
Court, given the frequency of applications for stays in capital cases presented to circuit justices
and referred to the full Court. See generally Robert L. Stern et al., Supreme Court Practice
798–808 (8th ed. 2002); Kate Coscarelli, Alito: The Life and Times of a Justice in the Making,
The Star-Ledger, Aug. 27, 2006 (quoting Justice Alito as noting that "One of the unpleasant
parts of this job is that on a typical week there is at least one execution someplace."); see also
things.com/article.php3?id_article=2022 (stating that if he agreed with the Church's current teach­
ing on capital punishment he would have to resign).
likely sort of case where this might be a problem is the judicial bypass case: depending on the jurisdiction, a judge might be assigned a large enough number (or percentage of workload) of such cases that this presents a serious concern. Moreover, if there are a number of other areas of significant material cooperation, a judge should be alert to the cumulative effect.

As noted above, a major concern regarding material cooperation is the risk of scandal. When Catholic judges find laws that prohibit or limit abortion unconstitutional, they can scandalize others.

Sometimes the fact that "good" people are involved makes wrongdoing seem not so wrong and provides material for rationalizing and self-deception by people tempted to undertake the same sort of wrong. Perhaps more often the material cooperation of "good" people leads others to cooperate formally or wrongly, even if only materially.152

Scandal, however, can frequently be avoided, or at least significantly reduced, "by letting others know that such co-operation does not imply approval."153

In sum, it would appear that in most abortion cases, a judge's material cooperation is permissible, particularly if a judge takes steps to avoid scandal by letting others know that his or her legal decision does not imply approval of direct abortion. However, in the context of judicial bypass proceedings, where a judge determines that a minor is sufficiently mature to make the abortion decision without parental involvement, the material cooperation may well be impermissible. (As discussed above, in a judicial bypass where a judge concludes that a minor is not sufficiently mature to make the abortion decision and determines that a direct abortion is in her best interests always constitutes formal cooperation.) For this reason, Catholic judges should not decide judicial bypass proceedings. Moreover, since a petition seeking a judicial bypass would routinely seek relief in the alternative (the minor is mature; if not, abortion is in her best interests), even if the material cooperation as to the determination of maturity were permissible, there is good reason to avoid the proceeding in its entirety.

V. RESIGNATION, RECUSAL, OR ONE-WAY RECUSAL

What is a judge to do if confronted with a case in which the law requires either formal cooperation in evil or impermissible material cooperation in evil? Although some have argued that resignation is required, or proffered other alternatives, the best response is ordinarily recusal.154 In this

152. 3 GRIEZ, supra note 41, at 881.
153. I DAVIS, supra note 65, at 348.
154. See, e.g., Avery Cardinal Dulles, Catholic Social Teaching and American Legal Practice, 30 FORDHAM URB. L.J. 277, 288 (2002) ("If the existing law is truly contrary to the conscientious convictions of the judge, the judge may have to recuse herself rather than cooperate in a morally evil action."); Bradley, supra note 116, at 289 ("If he can give judgment according to immoral
Part, I first address the competing arguments regarding recusal and resignation, explaining why recusal is usually sufficient and resignation usually unnecessary. I then consider and reject two alternatives that have been suggested. Finally, I note an important interaction between the doctrine of cooperation and the law of recusal.

A. Recusal or Resignation

Some have suggested that a judge must resign. Most notably, Justice Scalia has suggested that a Catholic judge who accepts current teaching on the death penalty should resign. Although he noted his awareness of the doctrine of material cooperation, his application was rather cursory, apparently thinking that the only justification for such cooperation would be if the particular judge were somehow indispensable to society. As we have seen, there are significant reasons for a judge to materially cooperate in sin. From the perspective of moral theology, it would seem that resignation would only be called for if the cases were so frequent as to cause cumulative harm to the judge, such as by hardening his heart to injustice, diminishing his solidarity for the victims of injustice, or losing the ability to offer credible witness against wrongdoing.

Others have argued from a civil law perspective that moral objection to a law is not a basis for recusal and therefore a judge whose moral views prevent him from applying a law must resign. Under both the Model Code of Judicial Conduct, and under the relevant federal statute, judges are to recuse themselves if their impartiality can reasonably be questioned.

positive law without rendering himself formally or unfairly materially complicit in its immorality, and without giving scandal, then he may licitly do so. . . . If not, then he must recuse himself.

Kenneth Williams, Should Judges Who Oppose Capital Punishment Resign? A Reply to Justice Scalia, 10 VA. J. SOC. POL'y & L. 317, 342 (2003) (“There is another less drastic option than resignation available in the case of a judge who feels so strongly about the death penalty that he or she is unable to enforce it: recusal from the case.”).

155. Scalia, supra note 151 (“I find it hard to see how any appellate judge could find [that material cooperation in death penalty cases is permissible] unless he believes retaining his seat on the bench (rather than resigning) is somehow essential to preservation of the society—which is of course absurd.”). Justice Scalia’s perspective on resignation may be shaped by his role as the Circuit Justice for the Fifth Circuit; due to that assignment, he is likely involved in more death penalty cases than any other judge in the nation.

156. See Letter from Paul D. Carrington et al. to Chief Justice Frank F. Drowota, III (Aug. 12, 2005), available at http://bib.law.washington.edu/tennessiejudges.pdf [hereinafter Letter from Paul D. Carrington] (stating that the “two ethical and appropriate responses” are either to “rule” according to the law” or “resign from the bench if one’s moral convictions prevent one from impartially applying the law”).


Although the Model Code also provides that “[a] judge shall hear and decide matters assigned to the judge except those in which disqualification is required,” there is considerable ac-
The impartiality of a judge whose moral views compel a particular result in a case can certainly be reasonably questioned. Consider a judge who agrees with the analysis above and believes that finding an abortion to be in the best interests of a minor in a judicial bypass proceeding constitutes formal cooperation in sin. Can there be any doubt that the judge's impartiality can reasonably be questioned?

Indeed, some scholars who argue that judges should resign admit that "judicial recusal is ethically appropriate and perhaps required when a judge is convinced that his or her moral views render the judge unable to decide acceptance of a judicial practice of adopting a more prophylactic recusal policy. Model Code of Jud. Conduct Canon 3(B)(1) (2003); see, e.g., Ross E. Davies, The Reluctant Recusants: Two Parables of Supreme Judicial Disqualifications, 10 Green Bag 79 (2006) (describing the general (but not absolute) practice of Justice Marshall to recuse in cases in which the NAACP participated from his appointment until 1984 and the praise this practice received); Leslie W. Abramson, Judicial Disqualification Under Canon 3 of the Code of Judicial Conduct 56–57 (2d ed. 1992) (noting that "to avoid even the appearance of partiality, many judges routinely disqualify themselves, for a period of time or even indefinitely, from hearing any matters in which their former law office is involved, whether or not the particular matter was pending before the judge left the firm" even though recusal is not required that broadly) (internal quotation marks and citation omitted); Cooke v. United States, 267 U.S. 517, 539 (1925).

All we can say upon the whole matter is that, where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge, called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.

158. See Jeffrey M. Shaman & Jona Goldschmidt, Judicial Disqualification: An Empirical Study of Judicial Practices and Attitudes 39–40 (American Judicature Society 1995) (noting, in a discussion regarding disqualification in an abortion bypass proceeding, that if "the judge's opinion . . . is so strongly held that the judge cannot be open minded or cannot fairly follow the law, the judge should be disqualified from presiding over the case"); Garvey & Coney [Barrett], supra note 43, at 334 ("Because the judge is unable to give the government the judgment to which it is entitled under the law," the judge must disqualified himself); see also Rehearing on Abortion for Girl, N.Y. Times, Oct. 30, 1982, at 128 (reporting decision of Michigan's Kent County Circuit Court that Judge Randall Hekman, who refused to approve an abortion, was disqualified because "he only had one choice going in," and "[h]is choice was so preordained from the start of the hearing that this obviously did not become an impartial hearing"); Randall J. Hekman, Justice for the Unborn 7 (1984) (stating that a "judge should disqualify himself when he cannot in good conscience enter an order required by the law"); id. at 155, 162–64 (finding that an abortion was not in a minor's best interest and concluding that his recusal was not necessary even though if the evidence "went the other way, I would still not be able to order an abortion . . . unless . . . necessary to save the life of the pregnant girl," because higher law superseded the Supreme Court); id. at 15 (stating Judge Hekman's belief that his decision was "not only morally right but ultimately legally right"); id. at 14–15 (reporting that, on appeal, Judge Robert Benson of the Kent County Circuit Court ruled that the minor was entitled to a "new hearing on her abortion request before a judge who would not have any preconceived notions as to the wrongdoing of abortion"); cf. Michelle T. Friedland, Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech, 104 Colum. L. Rev. 563, 593 (2004) (arguing that due process requires that if a judicial candidate "states an intention to ignore or violate" a clear legal rule, "she should be disqualified from hearing cases involving it"); United States v. Antar, 53 F.3d 568, 573 (3d Cir. 1995) (finding plain error in failure to recuse where district judge stated that his "object in this case from day one has always been to get back to the public that which was taken from it as a result of the fraudulent activities of this defendant and others").
facts and law impartially in a particular case."\textsuperscript{159} They object, however, to blanket recusals in a category of cases rather than the exercise of "discretion in the circumstances of each case in deciding whether recusal is required."\textsuperscript{160} They offer no authority for the proposition that recusal decisions must be made on a case-by-case discretionary basis rather than on a categorical basis. This is hardly surprising. Both the \textit{Model Code of Judicial Conduct} and the relevant federal statute enumerate categories where recusal is required,\textsuperscript{161} and there is a common practice of judges creating recusal lists for the use of the clerk's office.\textsuperscript{162}

\textsuperscript{159} Letter from Paul D. Carrington, \textit{supra} note 156, at 1-2 (emphasis in original); \textit{see also} John Leubsdorf, \textit{Theories of Judging and Judge Disqualification}, 62 N.Y.U. L. Rev. 237, 265-66 (1987) (stating that under a cognitive approach to judging, "when a judge admits that he cannot or will not appraise the merits of the case, either by saying so or by voluntarily withdrawing, disqualification is appropriate") (footnote omitted); \textit{id. at} 288 n.247 (arguing that under a constrained dialogue approach to judging, which he favors, "the principle of willingness to listen provides for disqualification when a judge is unable or unwilling to follow clear law" and that "for purposes of disqualification, one should look only to the judge's willingness to engage in the constrained dialogue of the law" so that disqualification is required of a judge who has moral "reasons for disregarding precedent that are not plausible with the legal system").

\textsuperscript{160} Letter from Paul D. Carrington, \textit{supra} note 156, at 2.

\textsuperscript{161} \textit{See, e.g., Model Code of Jud. Conduct} Canon 3(E) (2003) (requiring recusal where the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding . . . [or] the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) is a party to the proceeding, or an officer, director or trustee of a party; [or] (ii) is acting as a lawyer in the proceeding);

\textsuperscript{162} \textit{See, e.g., In re Cabletron Sys., Inc.}, 311 F.3d 11, 22 (1st Cir. 2002) (referring to the "recusal lists of the two other federal district judges in the District of New Hampshire"); D. Vt. R. 5.2

The Clerk's Office maintains a current list of companies in which each judge of this court, individually or as a fiduciary (including a judge's spouse or minor children who reside with the judge) holds a financial interest in, thereby requiring recusal. During initial case assignment, the Clerk's Office makes every effort to avoid known conflicts. Parties or counsel wishing to confirm that no financial conflict-of-interest exists in cases as assigned may obtain a copy of the Court's recusal list upon written request to the Clerk of Court.
It is true that if a judge were to recuse too frequently it could be said that the judge is simply not doing the job required and unfairly burdening the other judges who must pick up the slack. This point, however, applies to recusals based on any reason, and is not limited to recusals based on morality. Our legal system, by requiring recusal for a wide range of reasons, contemplates that a judge is doing the job required even if he or she cannot hear every case assigned. For example, recusal is required whenever the judge "served in government employment and in such capacity participated as counsel . . . concerning the proceeding." This provision can result in recusals in a large category of cases when a United States Attorney is appointed to the bench. So long as the frequency of recusals for moral reasons is comparable to an acceptable frequency of recusals for other reasons—such as ownership of stock or having many close relatives who appear before the court—there is no unfair burden on other judges and no need to resign. Thus the legal analysis here parallels the moral analysis: if the number of cases presenting the problem is sufficiently high, resignation may be appropriate. If not, resignation is unnecessary overkill.

Professor Tamanaha does not dispute this legal analysis, but argues that when additional moral considerations—including the impact on other judges, the minor, and the law—are taken into account, resignation is the right response. In calling for resignation, however, Professor Tamanaha makes no effort to address the importance of the frequency of recusals. But his concerns seem to depend largely on an assumption of a high frequency of recusals.

Consider first the death penalty context. Suppose someone who concludes that it would be sinful to sentence someone to death is appointed a United States District Judge for the District of Minnesota. The chance that this judge will ever be assigned a case in which the United States is seeking
the death penalty is remarkably low.\textsuperscript{169} Suppose further that after serving on the bench for fifteen years, such a case is brought and assigned to this judge—and that the judge can reasonably predict that the chance of ever being assigned another one before retiring is vanishingly small. Surely there is scant reason to insist on resignation rather than recusal, at least in a legal regime that would require far more frequent recusals from a former United States Attorney who was appointed to the bench and that provides at least six other district judges for the district.\textsuperscript{170}

It would be quite different if Congress were to create a United States Court for Terrorism Prosecutions, staffed with its own judges, and routinely seek the death penalty there. A judge of that court who later concluded that it was sinful to sentence someone to death should resign rather than hold the seat while routinely recusing from its cases.\textsuperscript{171} But suppose that Congress were to create a United States Court for Terrorism Prosecutions and staff it with \textit{existing} district judges designated by the Chief Justice.\textsuperscript{172} Would it be permissible, in Professor Tamanaha's view, for a district judge to decline such a designation, or would the judge be obliged to resign as a district judge if the Chief Justice were to make such a designation? Surely the former is far more reasonable.

Consider, now, the abortion bypass context. Suppose a judge of a state trial level criminal court has served ten years. Suppose further that one morning none of the judges appointed to the state family court, who ordinarily hear abortion bypass proceedings, are available, so the petition is assigned to him. He could reasonably predict that this would happen at most twice more during his career if he stayed on the bench. It is difficult for me to see why resignation is appropriate rather than recusal if we envision a handful of recusals on moral grounds over the course of a career—again, at least in a legal regime that has enough other judges and enough other work to be done that it would let him stay on the bench with far more frequent recusals if, say, his daughter were an assistant prosecutor. The burden on the legal system, as well as the burden on other judges, would be far greater

\textsuperscript{169} See Death Penalty Information Center, http://www.deathpenaltyinfo.org/state/ (2007) (noting that Minnesota does not have a death penalty statute); Jessica Branby, \textit{The Death Penalty in Minnesota: A Short History}, http://www.twincitiesamnesty.org/mn_dp_resources.html (select "A Short History of the Death Penalty in Minnesota") (last visited Mar. 21, 2007) (noting that the last execution in Minnesota occurred in 1906, and that Minnesota repealed its death penalty statute in 1911). I do not mean to suggest that the absence of a death penalty statute in the state of Minnesota forecloses the federal government from seeking the death penalty in a federal district court in that state.


\textsuperscript{171} \textit{Cf.} Fugitive Slave Act of 1850, 9 Stat. 462, § 3, \textit{repealed by} 13 Stat. 200 (providing that "the Circuit Courts of the United States shall from time to time enlarge the number of the commissioners, with a view to afford reasonable facilities to reclaim fugitives from labor, and to the prompt discharge of the duties imposed by this act").

if a judge were obliged to resign the first time he confronted a case that required recusal on moral grounds.

Similarly, imagine if a state court system were to ordinarily rotate judges through a variety of different assignments in their early years on the bench before having them settle down in one assignment likely to last for the rest of their careers. Suppose someone who had been the head of a county prosecutor's office was appointed to the state bench. Given her background, skills, and interests, it was almost certain that eventually she would be assigned indefinitely to criminal cases, but she faced a rotation in family court where, say, two percent of the cases were abortion bypass cases. If this state court system would assign her fewer criminal cases in her earlier years (or assign her to a different county) in order to accommodate her need to recuse from numerous prosecutions, why should she resign, rather than simply receive more child support cases (or even an extra rotation hearing small claims cases) if she concluded that she could not hear abortion bypass cases?

These illustrations, I believe, underscore the frequency of recusals matters. If the frequency of recusals is sufficiently high, resignation is appropriate; otherwise, it is not.173

Professor Tamanaha suggests that abortion bypass cases are different, that, in effect, one cannot simply trade an abortion bypass case for a child custody case and call it even, the way that one can trade a case brought by a party in which one owns stock for a case brought by a different party. He contends that “[n]o judge wants to handle” abortion bypass cases, that “[e]very judge will... recognize that a pregnant minor has no good options and a difficult future,” and that “[t]ragedy will follow no matter which way a judge rules.”174 While many defenders of abortion rights have adopted this view of abortion, others criticize it as “play[ing] into the hands of our opponents.”175 For a judge who thinks that “[b]emoaning abortion is like

173. Just as “[o]ne should not refuse to appoint a judge because some day someone might sue her uncle,” Leubsdorf, supra note 159, at 269, one should not insist on resignation when that day comes.

174. Tamanaha, supra note 38, at 277–78.

175. Caitlin Borgmann & Catherine Weiss, Beyond Apocalypse and Apology: A Moral Defense of Abortion, 35 Persp. of Sexual & Reprod. Health 40, 41 (2003); see also Katha Pollitt, Prochoice Puritans, The Nation, Feb. 13, 2006, at 9 (criticizing those who “think abortion is tragic and terrible and wrong” and arguing that the debate is “too moralistic already”); Marlene Gerber Fried, Abortion in the United States—Legal But Inaccessible, in Abortion Wars: A Half-Century of Struggle, 1950–2000 at 208, 224 (Rickie Solinger ed., Univ. of Cal. Press 1998) (“We must reject pro-choice sentiments like President Clinton’s that take the form of saying that abortion should be legal but rare”); id. (“We have to disagree when our erstwhile allies call abortion a ‘necessary tragedy.’ Abortion is no tragedy. No moral slip for which we forgive hapless, weak women. Abortion is... as profoundly ethical an act as any of us will ever see.”) (internal quotation marks and citation omitted); Josh Gerstein, Could Edwards become First Woman President?, N.Y. Sun, Mar. 8, 2007 (noting that Kate Michelman is still fuming over Hillary Clinton’s description of abortion as a “sad, even tragic choice to many, many women,” and may never forgive her for suggesting that abortion should be rare).
lamenting open-heart surgery in the face of Americans' unacceptably high rate of heart disease,"176 a case that calls upon him to decide whether an abortion is in a minor's best interests is as much an opportunity for doing good as a case that asks whether open-heart surgery is in the best interests of an incompetent patient. Evidence suggests that most judges do not agonize over these proceedings: The overwhelming majority of bypass petitions are granted after very short hearings.177

As long as there are judges—state or federal—who believe in the morality of abortion, there will be judges to vindicate the minor's legal right. And if the day comes that there are no judges in a given particular state, no judges in a particular circuit, and no judges on the Supreme Court who believe in the morality of abortion, the political and legal culture will have already changed so substantially that Roe will have long become a fixture in the anti-canon of constitutional law.178

B. Other Suggested Alternatives

i. Decline to Rule at All in Abortion Bypass Cases

It has also been suggested that judges in abortion bypass cases should decline to rule, thereby permitting abortion by operation of law. From a legal perspective, this proposal calls for the judge to simply abandon her work while retaining the office. I do not see how this can be justified. It seems to me that the judge must either give up the office by resigning, do her job and decide the case in accordance with the law, or recuse (in accordance with the law) and thereby cause the case to be assigned to another judge. From a moral perspective, this proposal calls for the judge to simply abandon the girl: No one decides if she is mature enough to make the decision on her own and no one with legal authority to do so decides (if she is not mature) what is in her best interests. If she is, in fact, too immature to make the decision herself, a judge who simply declines to rule is abandoning her, either to her own insufficiently mature devices, or to the pressures of others.

Here, one can see the value of situating the doctrine of cooperation in the context of charity and fraternal correction. The focus of avoiding material cooperation should not be on keeping one's own hands clean, but rather on concern for one's sisters and brothers. Refusing to rule and thereby

176. Borgmann & Weiss, supra note 175, at 41 ("We hope never to need a coronary bypass, but we are grateful to have the procedure available if we need it.").

177. See Collett, supra note 123, at 522–24 (noting, for example, that of 3573 bypass petitions filed in Minnesota between August 1, 1981 and March 1, 1986, only nine were denied, and that a study in Massachusetts showed that the average length of a hearing was 12.12 minutes).

abandoning the girl smacks of concern, not for the girl, but for keeping the judge’s hands clean.179

### ii. One-Way Recusal

On the other hand, some have suggested what could be dubbed a one-way recusal. Under this proposal, articulated by Michael Paulsen but perhaps held by others, a judge decides the case on legal grounds in his own mind. If that legal conclusion adheres with the judge’s moral duties, the judge issues the decision. If, however, that legal conclusion is inconsistent with the judge’s moral duties, the judge recuses at that point.180

Although this approach is tempting, and there may be situations in which the moral issue does not crystallize in a judge’s mind until the point of decision, it is ultimately not appropriate as a general approach. “How a judge ultimately decides a case has no effect on whether he had a duty to disqualify himself at the outset.”181 Both as a matter of efficiency and of fairness, recusal should be done at the outset of a case, not at what would otherwise be its conclusion.182 It is incredibly inefficient and burdensome to the judicial system for a judge to hear and tentatively decide a case, only to recuse at that point. In a trial court, everything would have to be repeated before another judge. In an appellate court, a different panel would have to be constituted, perhaps with all new judges because the now-recused judge participated in the deliberations regarding the case.183 It would be particularly burdensome if the judge knew all along recusal might be necessary if the correct legal result turned out to be what one of the parties sought.

---

179. Note that in Matthew’s account, Pilate did not recuse himself and have a different Roman official judge the case, but instead refused to rule and let those who had brought Jesus to him have their way. Matthew 27:24 (“When Pilate saw that he was getting nowhere, but that instead an uproar was starting, he took water and washed his hands in front of the crowd. ‘I am innocent of this man’s blood,’ he said. ‘It is your responsibility!’”). Cf. Mark 15:9-15; Luke 23:13-25; John 19:12-16 (describing Pilate’s actions without the hand-washing account). See also CATECHISM OF THE CATHOLIC CHURCH, supra note 11, No. 185 (Nicene Creed) (“For our sake he was crucified under Pontius Pilate.”).

180. Paulsen, supra note 60, at 78–79 (advocating recusal “after thorough legal investigation of the possibilities that the case may not in fact be controlled by Roe,” and urging that a “judge should not recuse himself in advance of the case, as one pro-life lower federal court judge is rumored to do in any case involving abortion”).


182. See Leubsdorf, supra note 159, at 265 (“The court should decide early in a case whether the judge should withdraw.”); Freedman, supra note 181, at 527 (“Again, the decision regarding recusal [is] to be made at the outset of the case.”).

183. See, e.g., United States Senate Committee on the Judiciary, Questionnaire of Judge Samuel Alito 55, http://judiciary.senate.gov/pdf/Alito_Questionnaire.pdf (reporting that after he recused himself in a case, he requested “that a new panel of judges be appointed to rehear the case”); but see Committee on Codes of Conduct, Advisory Opinion No. 71 (Dec. 14, 1981), available at http://www.uscourts.gov/guide/vol2/71.html (concluding that where one judge is recused after conference, “the remaining two judges on the panel are not disqualified merely because they conferred with the disqualified judge”).
The importance of timeliness is reflected in the law of recusal in at least two ways. First, some otherwise-required recusals can be avoided by divestiture, if “after substantial judicial time has been devoted to the matter, because of the appearance or discovery” of an otherwise disqualifying financial interest. That is, the law of recusal is sensitive to the waste of judicial resources. Second, “[m]ost circuits require that a motion for disqualification be brought at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim.” Just as a litigant “cannot wait until after an unfavorable judgment before bringing the information to the court’s attention,” a judge should not wait until after reaching an unfavorable decision in his own mind before deciding to recuse.

Moreover, if a judge believes that only one result in a case would be morally acceptable, the judge’s impartiality could reasonably be questioned. Consider again a judge who believes that finding an abortion to be in the best interests of a minor in the judicial bypass constitutes formal cooperation in evil. Suppose the judge were to hear the case nevertheless, and decide that a direct abortion was not in the minor’s best interests. Surely the judge’s impartiality in reaching that conclusion could reasonably be questioned; by hypothesis, he could not decide the case the other way no matter how clear the law and the facts.

Although for these reasons, Paulsen’s suggestion of one-way recusal is not appropriate, one aspect of Paulsen’s proposal should be adopted. He argues that when a judge recuses on moral grounds, the judge should explain the basis of the recusal. Nothing in the law prevents such explanations, and they not only may help others to understand the decision, but also may reduce the risk of scandal associated with cases where the judge does not recuse.

186. United States v. Rogers, 119 F. 3d 1377, 1380 (9th Cir. 1997); see also Leslie W. Abramson, Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,” 14 GEO. J. LEGAL ETHICS 55, 70 (2000) (noting that “the judge should be the first to raise the issue by recusing in a particular case”).
187. Paulsen, supra note 60, at 78–79 (urging recusal “accompanied by a full ‘judicial’ opinion explaining . . . why the judge must therefore decline to enforce [Roe], and must recuse himself from rendering a decision on the merits of the case before him”).
188. Bradley, supra note 116, at 289.

The real alternatives to giving judgment according to the (unjust) positivist law are to recuse oneself from the case or to resign the office. Either move should be accompanied by a clear public statement of the reasons for doing so; the people who trusted one with judicial responsibility are entitled to be told why this exercise of the judicial office cannot, in good conscience, be performed.

Some have objected that an explanation of the reason for recusal “undermines confidence in the judiciary’s commitment to uphold state law.” Letter from Paul D. Carrington, supra note 156, at 2. This objection is puzzling for two reasons: First, it is rare to see judges criticized for explain-
C. The Interaction of Cooperation and Recusal

Finally, note the interaction between the moral theology of cooperation and the civil law of recusal: The more situations in which the principles of cooperation prohibit judges from acting in ways that are at variance from Catholic teaching, the more situations in which the civil law of recusal will prevent those judges from hearing those cases at all. If it is impermissible material cooperation for a judge to find an anti-abortion law unconstitutional, then the judge may not entertain such a case—even if at the end of the day the judge would have upheld the constitutionality of the law on legal grounds. In other words, if the Catholic Church were to convince Catholic judges that they cannot (as a moral matter) find laws against abortion unconstitutional, those judges will not (as a legal matter) be able to decide cases challenging those laws at all. If Catholic judges are to decide such cases at all, they must decide them in accordance with the law.

VI. Conclusion

To those who are worried that Catholic judges will not be faithful to the law, I urge you to bear in mind that the Catholic Church does not attempt to outlaw all sins, that much material cooperation is permissible, and that in the rare case that involves formal cooperation or impermissible material cooperation, the judge may recuse himself. Such cases are sufficiently uncommon that there is unlikely to be any need to resign.

To those who are worried that Catholic judges will not be faithful to the Church, I urge you as well to bear in mind that the Catholic Church does not attempt to outlaw all sins, and that much material cooperation is permissible. I further urge you not to assume that a judge is engaged in formal cooperation, remembering that the very same outward action may constitute formal or material cooperation depending on the judge's intent. I also urge you not to attempt to make material cooperation less permissible than the received tradition allows, because if you succeed, the law will require more recusals, perhaps even resignations. Put bluntly: if you want Chief Justice Roberts and Justices Scalia, Thomas, and Alito to overrule their decisions, rather than criticized for failure to explain them. Second, recusal where one's impartiality can reasonably be questioned is designed to enhance confidence in the judiciary's commitment to impartial adjudication of cases in accordance with the law. The recused judge, after all, is not deciding the case at all, but leaving it to be decided by another judge in accordance with the law. Cf. Foertsch, supra note 163, at 460 ("Justices, as well as other federal judges, should provide a written explanation any time recusal is an issue, whether it is accepted or denied."); Public Util. Comm. v. Pollak, 343 U.S. 451, 467 (1952) (Frankfurter, J.) ("I am explicit as to the reason for my non-participation . . . because I have for some time been of the view that it is desirable to state why one takes himself out on a case.").


190. See Compassion in Dying v. Wash., 49 F.3d 586, 594 (9th Cir. 1995) (emphasizing that the "compass of a federal judge . . . is the Constitution of the United States").
Roe; you must accept that it is not necessarily sinful for Justice Kennedy (or Chief Justice Roberts or Justice Alito) to uphold it. Finally, to the extent that the real concern about judicial action is the risk of scandal, I urge you to focus directly, clearly, and emphatically on that risk—probably using a more accessible term than "scandal"—and perhaps even suggest ways that judges might be able to reduce the risk of scandal.

Finally, to Catholic judges: I urge you not to forget your moral obligations. You are not a slave to the legal order. Your job usually involves permissible material cooperation, but watch your intent, and take care that the cumulative impact of material cooperation does not lead you to slide from material to formal cooperation or alter your fundamental commitment. I also urge you to pay close attention to risk of scandal, remembering that scandal can frequently be avoided (or at least significantly reduced) by letting others know that cooperation does not imply approval. You can do this by explaining the difference between one's legal judgment and one's moral judgment, perhaps in a judicial opinion, as Judge Walker and the late Judge Casey did in a partial birth abortion case,191 or perhaps in a different forum, as Judge Nygaard did in a Catholic magazine article about the death penalty after upholding one on habeas.192 Finally, while I certainly do not wish St. Thomas More's fate on any judge, I do pray that, when your race is run, you, like him, can say that you die the King's good servant, but God's first.

191. Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 290 (2d Cir. 2006) (Walker, C.J., concurring) (describing binding Supreme Court precedent as effectively holding "that the deeply disturbing—and morally offensive—destruction of the life of a partially born child cannot be banned by a legislature without an exception for the mother's health (as determined by her doctor)"); id. at 296 ("In today's case, we are compelled by a precedent to invalidate a statute that bans a morally repugnant practice."); see also Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 479 (S.D.N.Y. 2004) (Casey, J.) (finding as a matter of fact that "D & X is a gruesome, brutal, barbaric, and uncivilized medical procedure" but nevertheless concluding as a matter of law that statute prohibiting it is unconstitutional).